INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

VOLUME I

Special Agreement; Memorial of Indonesia

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

VOLUME I

Compromis; mémoire de l'Indonésie

Abbreviated reference:

I.C.J. Pleadings, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Vol. I

Référence abrégée:

C.I.J. Mémoires, Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), vol. I

ISSN 0074-4433
ISBN 978-92-1-071073-2

Sales number
N° de vente: **962**

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (INDONESIA/MALAYSIA)

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN (INDONÉSIE/MALAISIE)

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

VOLUME I

Special Agreement; Memorial of Indonesia

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE RELATIVE À LA SOUVERAINETÉ SUR PULAU LIGITAN ET PULAU SIPADAN

(INDONÉSIE/MALAISIE)

VOLUME I

Compromis; mémoire de l'Indonésie

IMPRIMÉ EN FRANCE
PRINTED IN FRANCE

This case, entered on the Court's General List on 2 November 1998 under number 102, was the subject of Judgments delivered on 23 October 2001 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 575) and 17 December 2002 (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625).

The documents relating to the case are being published in the following order:

Volume I. Special Agreement; Memorial of Indonesia.
Volume II. Memorial of Indonesia *(continuation)*.
Volume III. Memorial of Indonesia (Affidavits and Maps).
Volume IV. Memorial of Malaysia.
Volume V. Memorial of Malaysia (Maps).
Volume VI. Counter-Memorial of Indonesia.
Volume VII. Counter-Memorial of Malaysia; Reply of Indonesia.
Volume VIII. Reply of Malaysia; Application for Permission to Intervene by the Philippines; Written Observations of Indonesia and Malaysia; Verbatim Records of the Hearings.
Volume IX. Verbatim Records of the Hearings *(continuation)*.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2010.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 102 le 2 novembre 1998, a fait l'objet d'arrêts rendus le 23 octobre 2001 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), requête à fin d'intervention, arrêt, C.I.J. Recueil 2001*, p. 575) et le 17 décembre 2002 (*Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002*, p. 625).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant:

Volume I. Compromis; mémoire de l'Indonésie.
Volume II. Mémoire de l'Indonésie *(suite)*.
Volume III. Mémoire de l'Indonésie (déclarations sous serment et cartes).
Volume IV. Mémoire de la Malaisie.
Volume V. Mémoire de la Malaisie (cartes).
Volume VI. Contre-mémoire de l'Indonésie.
Volume VII. Contre-mémoire de la Malaisie; réplique de l'Indonésie.
Volume VIII. Réplique de la Malaisie; requête à fin d'intervention des Philippines; observations écrites de l'Indonésie et de la Malaisie; comptes rendus d'audience.
Volume IX. Comptes rendus d'audience *(suite)*.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement*; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

La Cour souhaitant que lesdits documents paraissent aussi rapidement que possible, il a été décidé, chaque fois que les moyens techniques le permettraient, de reproduire les pièces de procédure en l'état où elles ont été présentées par les parties.

Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios: outre la pagina..on continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2010.

CONTENTS — TABLE DES MATIÈRES

Page

Special Agreement – Compromis

JOINT NOTIFICATION, DATED 30 SEPTEMBER 1998, ADDRESSED TO THE REGISTRAR OF THE COURT 3

1. Special Agreement 5
2. Procès-Verbal of exchange of instruments of ratification 7

Annex 1. Instrument of Ratification of Indonesia 8
Annex 2. Instrument of Ratification of Malaysia 9

Memorial of Indonesia – Mémoire de l'Indonésie

List of maps and photographs 14
Spelling of place names 15

CHAPTER I. INTRODUCTION 17

Section 1. The background to the case 17
Section 2. Overview of Indonesia's case and structure of the Memorial . . . 18

CHAPTER II. GEOGRAPHICAL DESCRIPTION OF THE AREA 23

Section 1. Introduction 23
Section 2. The general setting 23
Section 3. Pulau Ligitan. 24
Section 4. Pulau Sipadan 25

CHAPTER III. A SUMMARY OF STATE RELATIONS IN THE AREA (1824-1969) . . . 27

Section 1. Introduction 27
Section 2. Relations between the local Sultanates and extra-regional Powers. 27

A. The Sultanates on the Island of Borneo 27
B. Settlements by the Western Powers in Borneo. 28

Section 3. An overview of the origins of the British North Borneo Company 35

A. The establishment of the Company and its application for a royal Charter 35
B. Dutch and Spanish reactions and British reassurances. 37
C. The administrative divisions of the British North Borneo Company . . 43

Section 4. Dutch-British relations from 1882 to the signature of the 1891 Convention. 45
Section 5. Further relations between the relevant Powers concerning their possessions in and around Borneo from 1891 to 1930 47

A. Anglo-American discussions regarding certain islands off the coast of North Borneo 47
B. Dutch activities in the area: the HNLMS *Lynx* 50

Section 6. Events leading up to and following the independence of Indonesia and Malaysia 51

Page

A. Indonesia 51
B. Malaysia 52
C. Indonesia-Malaysia 1969 discussions 54

CHAPTER IV. THE PRE-1891 SITUATION 55

Section 1. Introduction 55
Section 2. The legal notion of territory as historically perceived by local rulers and its consequences as to the cessions of territories 56

A. The legal notion of territory in the region before the colonial period . . 57
B. The uncertain extent of the cessions by the local rulers to the colonial Powers 62

Section 3. Colonial acquisition by the Netherlands 71

A. Relations between the Netherlands and local rulers. 71
B. The acquisition of the territory of Boeloengan by the Netherlands and its geographical extent 75

CHAPTER V. THE CONVENTION OF 20 JUNE 1891 BETWEEN GREAT BRITAIN AND THE NETHERLANDS 81

Section 1. The background to, and negotiation and terms of, the Convention of 20 June 1891 81

A. Background to the Convention of 20 June 1891 81
B. The negotiations for the Convention of 20 June 1891 94
C. Survey by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda*, June 1891 . 99

Section 2. The terms of the Convention of 20 June 1891. 102
Section 3. Ratification of the Treaty 106
Section 4. Conclusions 118

CHAPTER VI. RESPECT OF THE 1891 LINE IN PRACTICE 120

Section 1. Activities of the Netherlands and Indonesia with respect to the islands 120

A. Dutch activities 120
B. Indonesian activities 122

(i) Naval patrols to the islands 122
(ii) Traditional fishing activities 123

Section 2. The oil concession activities of the Parties 123

A. The Indonesian JAPEX Concession. 123
B. Malaysia's offshore oil concessions in the area 126
C. Conclusion 128

Section 3. Map evidence 130

A. Introduction 130
B. Maps relied upon by the Parties in the context of the 1891 Convention. 134

(i) Dutch and British cartographic evidence prior to the 1891 Convention 134
(ii) The map attached to the 1891 Dutch explanatory memorandum . . 136

C. Maps reflecting the offshore extension of the boundary during the early colonial period 139

Page

D. General repute: Third party maps showing the offshore extension of the boundary line 140

E. Maps as admissions against interest 141

(i) British maps showing Ligitan and Sipadan Islands as part of the Dutch possessions 143

(ii) Malaysian maps showing the area where Ligitan and Sipadan are located as falling outside of Malaysia's Possessions 144

F. Conclusions 148

CHAPTER VII. RELATIONS BETWEEN GREAT BRITAIN, SPAIN AND THE UNITED STATES 150

Introduction 150

Section 1. The position of Great Britain 150

A. The Dent and Overbeck Concessions 150

B. The formation and administrative boundaries of the British North Borneo Company 152

C. Conclusions as to the position of Great Britain 155

Section 2. The position of Spain 157

Section 3. The position of the United States 161

A. The United States' acquisition of the Philippine Islands in 1898 and 1900 161

B. Anglo-American discussions regarding certain islands off the coast of North Borneo 165

C. The Convention of 7 January 1930 between Great Britain and the United States 169

Section 4. General conclusions 172

CHAPTER VIII. THE EMERGENCE OF THE DISPUTE AND ITS AFTERMATH 174

Section 1. The 1969 negotiations 175

A. The development of the negotiations 175

B. Content and scope of the 1969 agreement 179

Section 2. The subsequent conduct of the Parties 183

A. Malaysia's recognition of Indonesian title after 1969 184

(i) The limits of the oil concessions 184

(ii) The 1972 Malaysian map 185

(iii) Maintenance of buoys on both sides of the 4° 10′ north line . . . 186

B. The legal significance of Malaysia's recognition 187

C. Indonesia's reactions vis-à-vis Malaysia's actions 191

(i) The 1979 Malaysian map 191

(ii) Malaysia's illegal occupation of Ligitan and Sipadan since 1980 . 194

(iii) Indonesia's protests and their legal significance 198

CHAPTER IX. SUMMARY OF INDONESIA'S CASE AND CONCLUSIONS 206

SUBMISSIONS 210

CERTIFICATION 211

Page

Annexes to the Memorial of Indonesia

Annex 1. Special Agreement for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning sovereignty over Pulau Ligitan and Pulau Sipadan, between the Government of the Republic of Indonesia and the Government of Malaysia, dated 31 May 1997 214

Annex 2. Treaties between the East India Company and the Sultan of Sulu in 1761-1769 218

Annex 3. Contract between the Sultan of Banjermasin and the Government of the Netherlands East Indies dated 3 January 1817 (extract from Dutch version and English translation) 226

Annex 4. Contract between the Sultan of Banjermasin and the Government of the Netherlands East Indies dated 13 September 1823 (extract from Dutch version and English translation) 228

Annex 5. Treaty between Great Britain and the Netherlands signed at London, 17 March 1824 230

Annex 6. Treaty between the English East India Company and the Sultan and the Tumungong of Johore dated 2 August 1824 235

Annex 7. Contract between the Sultan of Banjermasin and the Government of the Netherlands East Indies dated 4 May 1826 (extract from Dutch version and English translation) 241

Annex 8. Contract between the Sultan of Boeloengan and the Government of the Netherlands East Indies dated 27 September 1834 (English translation and Dutch version) 243

Annex 9. Capitulations of peace, protection and commerce between the Government of Her Catholic Majesty and the Sultan and Dattos of Sulu dated 23 September 1836 (English translation) 246

Annex 10. Resolution of the Governor-General of Netherlands India regarding the Dutch Possessions in Borneo dated 28 February 1846 (English translation and Dutch version) 248

Annex 11. Treaty of Friendship and Commerce between Her Majesty and the Sultan of Borneo dated 27 May 1847 255

Annex 12. Decree by the Minister of State, Governor-General of the Netherlands Indies, of 27 August 1849, No. 8 (English translation and Dutch version) 259

Annex 13. Contract between the Sultan of Boeloengan and the Government of Netherlands East Indies dated 12 November 1850 (extract of Dutch version and English translation) 264

Annex 14. Decree of the Governor-General of the Netherlands Indies amending the Territorial Subdivision of the Residency Southern and Eastern Division of Borneo, dated 2 February 1877 (English translation) . 266

Annex 15. Protocol between Spain, Germany and Great Britain dated 11 March 1877 (English translation) 268

Annex 16. Despatch from Acting Consul-General Treacher to the Earl of Derby, with inclosure, dated 2 January 1878 270

Annex 17. Despatch from Acting Consul-General Treacher to the Earl of Derby, with inclosure, dated 22 January 1878 277

Annex 18. Memorandum by Sir J. Pauncefote dated 7 May 1878 281

Annex 19. Ratification of Contract of Vassalage between the Netherlands Indies Government and the Sultan of Boeloengan, 2 June 1878, published in Printed Records of the Second Chamber 1879-1880, No. 86.

Page

Overeenkomsten met inlandsche vorsten in den Oost-Indischen Archipel. Boeloengan. Acten van verband en van bevestiging en contract. No. 21, and Explanatory Memorandum (English translation) 285

Annex 20. Memorandum Respecting Cessions to Messrs. Dent and Overbeck by Sultans of Brunei and Sulu of Territories on the North-East Coast of Borneo, and position of Her Majesty's Government in regard to such Cessions, dated 6 October 1879 291

Annex 21. Memorandum on the Political, Strategical, and Commercial Advantages to Great Britain of the Northern Part of Borneo; as well as on the Right of Holland, under the Treaty of 1824, to oppose the Occupation of any portion of that Territory by Great Britain, by Sir E. Hertslet, dated 4 November 1879 299

Annex 22. Extract from the Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880 (English translation) 338

Annex 23. Extract from *The London Gazette*, 8 November 1881, containing the text of the BNBC Royal Charter 341

Annex 24. Notes on the North Borneo Charter by Sir J. Pauncefote dated January 1882 347

Annex 25. Despatch from His Majesty's Plenipotentiary Minister in London to the Minister of State dated 22 March 1882 (English translation and Spanish version) 373

Annex 26. Despatch from the Minister of State to His Majesty's Plenipotentiary Minister in London dated 31 March 1882 (English translation and Spanish version) 376

Annex 27. Despatch from Count de Bylandt to Earl Granville dated 31 May 1882 379

Annex 28. Memorandum on the Dutch Frontier on the North-east Coast of Borneo by Sir E. Hertslet dated 20 June 1882 381

Annex 29. Despatch from Count de Bylandt to Earl Granville dated 12 August 1882 388

Annex 30. Despatch from Earl Granville to Count de Bylandt dated 31 August 1882 390

Annex 31. Despatch from Count de Bylandt to Earl Granville dated 1 December 1882 392

Annex 32. Despatch from Count de Bylandt to Foreign Office dated 25 March 1883 395

Annex 33. Protocol recognizing the sovereignty of Spain in the Archipelago of Joló (Sulu), dated 7 March 1885 (French version with F.O. English translation) 398

Annex 34. Agreement between Her Majesty's Government and the British North Borneo Company dated 12 May 1888 406

Annex 35. Despatch from Sir H. Rumbold to Lord Salisbury dated 19 November 1888 409

Annex 36. Draft *Memorandum on the Disputed Boundary between the British North Borneo Company and the Dutch Possessions on the North-East Coast of that Island*, by Sir E. Hertslet, dated 20 December 1888 415

Annex 37. Despatch from Mr. Hartsen to Count Bylandt dated 22 December 1888 433

Annex 38. Further Memorandum on the Disputed Boundary between the North Borneo Company and the Dutch Possessions on the North-East Coast of that Island, by Sir E. Hertslet, dated 9 January 1889 436

Page

Annex 39. Memorandum from Sir E. Hertslet to Sir J. Pauncefote dated 25 January 1889 450
Annex 40. Despatch from Lord Salisbury to Sir H. Rumbold dated 5 February 1889 456
Annex 41. Despatch from Sir H. Rumbold to Lord Salisbury dated 11 February 1889 enclosing Memorandum by British Legation, The Hague, dated 10 February 1889 462
Annex 42. Despatch from Sir H. Rumbold to Lord Salisbury dated 18 February 1889 464
Annex 43. Memorandum by Sir J. Pauncefote dated 23 February 1889 . . . 466
Annex 44. Parliamentary Debates (Commons) 1889: *Question asked in the House of Commons, 25 February 1889* 471
Annex 45. Letter from Sir J. Pauncefote to British North Borneo Company dated 28 February 1889 473
Annex 46. Letter from British North Borneo Company to Foreign Office, dated 8 March 1889 475
Annex 47. Despatch from Mr. Hartsen to Count de Bylandt dated 19 March 1889 478
Annex 48. Despatch from Lord Salisbury to Sir H. Rumbold dated 23 March 1889 483
Annex 49. Draft despatch from Lord Salisbury to Sir H. Rumbold dated 27 March 1889 485
Annex 50. Despatch from Lord Salisbury to Sir H. Rumbold dated 3 [8?] April 1889 489
Annex 51. Despatch from Count de Bylandt to Lord Salisbury dated 6 April 1889 491
Annex 52. Despatch from Lord Salisbury to Count de Bylandt dated 20 May 1889 497
Annex 53. Despatch from Count de Bylandt to Lord Salisbury dated 3 June 1889. 499
Annex 54. *Memorandum respecting proposed Bases for a Joint Commission on the North Borneo Boundary* by Sir E. Hertslet dated 19 June 1889. . . 501
Annex 55. Despatch from Lord Salisbury to Count de Bylandt dated 28 June 1889 504
Annex 56. Foreign Office manuscript notes made in preparation for Anglo-Dutch Joint Commission to resolve the boundary question, undated . . . 506

SPECIAL AGREEMENT

COMPROMIS

JOINT NOTIFICATION, DATED 30 SEPTEMBER 1998, ADDRESSED TO THE REGISTRAR OF THE COURT

New York, 30 September 1998.

On behalf of the Government of the Republic of Indonesia and the Government of Malaysia, and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice, we have the honour to transmit to you:

(1) a certified true copy of the Special Agreement for Submission to the International Court of Justice of the Dispute between the Republic of Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, signed at Kuala Lumpur on 31 May 1997;
(2) a certified true copy of the Procès-Verbal of the Exchange of Instruments of Ratification between the Republic of Indonesia and Malaysia, signed at Jakarta on 14 May 1998.

The aforesaid Special Agreement entered into force, pursuant to its Article 6, paragraph 1, on the date of exchange of instruments of ratification, i.e., on 14 May 1998.

In accordance with Article 35 of the Rules of Court, both Governments (the Government of the Republic of Indonesia and the Government of Malaysia) hereby notify the Court of their intention to exercise the power conferred by Article 31 of the Statute of the Court to choose a judge *ad hoc* in these proceedings.

We further have the honour to inform you, in accordance with Article 40 of the Rules of Court, that:

(1) H.E. Mr. Nugroho Wisnumurti, Director-General for Political Affairs, Department of Foreign Affairs of the Republic of Indonesia, and the Ambassador Extraordinary and Plenipotentiary of the Republic of Indonesia to the Kingdom of the Netherlands (whose name will be communicated later to the Court) have been appointed as Agent and Co-Agent for the Republic of Indonesia for the purpose of the present case, and their address for service at the seat of the Court shall be: H.E. Mr. Nugroho Wisnumurti, Agent of the Republic of Indonesia, and the Indonesian Ambassador to the Kingdom of the Netherlands, Co-Agent of the Republic of Indonesia, before the International Court of Justice, Embassy of the Republic of Indonesia to the Kingdom of the Netherlands, Tobias Asserlaan 8, 2517 KC The Hague.
(2) H.E. Datuk Abdul Kadir Mohamad, Secretary-General of the Ministry of Foreign Affairs, Malaysia, and H.E. Mr. A. Ganapathy, Ambassador Extraordinary and Plenipotentiary of Malaysia to the Kingdom of the Netherlands, have been appointed as Agent and Co-Agent for Malaysia for the purpose of the present case and their address for service at the seat of the Court shall be: H.E. Datuk Abdul Kadir Mohamad, Agent

of Malaysia, and H.E. Mr. A. Ganapathy, Co-Agent of Malaysia, before the International Court of Justice, Embassy of Malaysia to the Kingdom of the Netherlands, Rustenburgweg 2, 2517 KE The Hague.

(Signed) ALI ALATAS,
Minister for Foreign Affairs
of the Republic of Indonesia.

(Signed) DATO' SERI ABDULLAH HAJI AHMAD BADAWI,
Minister for Foreign Affairs
of Malaysia.

1. SPECIAL AGREEMENT

The Government of the Republic of Indonesia and the Government of Malaysia, hereinafter referred to as "the Parties";

Considering that a dispute has arisen between them regarding sovereignty over Pulau Ligitan and Pulau Sipadan;

Desiring that this dispute should be settled in the spirit of friendly relations existing between the Parties as enunciated in the 1976 Treaty of Amity and Co-operation in Southeast Asia; and

Desiring further, that this dispute should be settled by the International Court of Justice (the Court),

Have agreed as follows:

Article 1
Submission of Dispute

The Parties agree to submit the dispute to the Court under the terms of Article 36, paragraph 1, of its Statute.

Article 2
Subject of the Litigation

The Court is requested to determine on the basis of the treaties, agreements and any other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia.

Article 3
Procedure

1. Subject to the time-limits referred to in paragraph 2 of this Article, the proceedings shall consist of written pleadings and oral hearings in accordance with Article 43 of the Statute of the Court.

2. Without prejudice to any question as to the burden of proof and having regard to Article 46 of the Rules of Court, the written pleadings should consist of:

(a) a Memorial presented simultaneously by each of the Parties not later than 12 months after the notification of this Special Agreement to the Registry of the Court;

(b) a Counter-Memorial presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Counter-Memorial of the other Party; and

(d) a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary and the Court authorizes or prescribes the presentation of a Rejoinder.

3. The above-mentioned written pleadings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the part of the written pleadings corresponding to the said Party.

4. The question of the order of speaking at the oral hearings shall be decided by mutual agreement between the Parties or, in the absence of that agreement, by the Court. In all cases, however, the order of speaking adopted shall be without prejudice to any question regarding the burden of proof.

Article 4

Applicable Law

The principles and rules of international law applicable to the dispute shall be those recognized in the provisions of Article 38 of the Statute of the Court.

Article 5

Judgment of the Court

The Parties agree to accept the Judgment of the Court given pursuant to this Special Agreement as final and binding upon them.

Article 6

Entry into Force

1. This Agreement shall enter into force upon the exchange of instruments of ratification. The date of exchange of the said instruments shall be determined through diplomatic channels.

2. This Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the Charter of the United Nations, jointly or by either of the Parties.

Article 7

Notification

In accordance with Article 40 of the Statute of the Court, this Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties as soon as possible after it has entered into force.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

Done in four originals in the English language at Kuala Lumpur on the thirty-first day of May 1997.

For the Government of the Republic of Indonesia,

(Signed) ALI ALATAS,
Minister for Foreign Affairs.

For the Government of Malaysia,

(Signed) DATUK ABDULLAH AHMAD BADAWI,
Minister for Foreign Affairs.

2. PROCÈS-VERBAL OF EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned have met today for the purpose of exchanging the Instruments of Ratification of the Special Agreement for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan signed at Kuala Lumpur, Malaysia, on the 31st of May, 1997.

These Instruments, having been examined and found to be in due form, have been exchanged today.

In witness whereof, the undersigned have signed the present Procès-Verbal.

Done at Jakarta, this fourteenth day of May, in the year one thousand nine hundred and ninety-eight, in duplicate.

For the Government of the Republic of Indonesia,

(Signed) NUGROHO WISNUMURTI,

Director-General for Political Affairs, Department of Foreign Affairs of the Republic of Indonesia.

For the Government of Malaysia,

(Signed) DATO' ZAINAL ABIDIN BIN ALIAS,

Ambassador of Malaysia to the Republic of Indonesia.

Annex 1

INSTRUMENT OF RATIFICATION OF INDONESIA

Whereas, the "Special Agreement between the Government of the Republic of Indonesia and the Government of Malaysia for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan" was signed by the Minister for Foreign Affairs of the Republic of Indonesia and the Minister for Foreign Affairs of Malaysia at Kuala Lumpur, Malaysia, on 31 May 1997;

And whereas, the Government of the Republic of Indonesia, in accordance with Article 6, paragraph 1, of the Agreement, and having examined and considered the aforesaid Agreement, has decided to ratify the said Agreement;

Now therefore, be it known, that the Government of the Republic of Indonesia do hereby confirm and ratify the said Agreement and undertake to perform and carry out all the stipulations therein contained;

In witness whereof, this Instrument of Ratification is signed and sealed by the Minister for Foreign Affairs of the Republic of Indonesia;

Done at Jakarta this fourth day of May in the year one thousand nine hundred and ninety-eight.

(Signed) ALI ALATAS,
Minister for Foreign Affairs
of the Republic of Indonesia.

Annex 2

INSTRUMENT OF RATIFICATION OF MALAYSIA

Whereas, the Special Agreement for Submission to the International Court of Justice of the Dispute between Malaysia and Indonesia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan was signed at Kuala Lumpur on the thirty-first day of May, in the year one thousand, nine hundred and ninety-seven;

And whereas, the Government of Malaysia in accordance with Article 6 of the Agreement has decided to ratify the said Agreement;

Now therefore, the Government of Malaysia, having considered the said Agreement, hereby confirms and ratifies the same and undertakes faithfully to perform and carry out all the stipulations therein contained.

In witness thereof, this Instrument of Ratification is signed and sealed by the Minister of Foreign Affairs, Malaysia.

Done at Kuala Lumpur this 24th day of April, in the year one thousand, nine hundred and ninety-eight.

(Signed) DATO' SERI ABDULLAH BIN HAJI AHMAD BADAWI,
Minister of Foreign Affairs, Malaysia.

MEMORIAL OF INDONESIA

MÉMOIRE DE L'INDONÉSIE

CASE CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

(INDONESIA/MALAYSIA)

MEMORIAL

SUBMITTED BY

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

Volume 1

2 NOVEMBER 1999

LIST OF MAPS AND PHOTOGRAPHS

Facing page

Map 2.1. General Setting 20
Map 2.2. Location of Pulau Sipadan and Pulau Ligitan 20
Photographs of Pulau Sipadan and Pulau Ligitan 27
Map 3.1. Map Showing Three Marine Leagues from the Coast of North Borneo 32
Map 3.2. Extract from a Map of British North Borneo, Stanford, 1888 . . . 40
Map 4.1. European Settlements and Influence in the 18th Century (until 1786) 62
Map 4.2. South-East Asia from 1782 until 1828 75
Map 5.1. Sketch Map Showing the North-East Coast of Borneo c. 1885 . . . 86
Map 5.2. Explanatory Memorandum Map, 1891 110
Map 6.1. 1966 Permina/JAPEX Concession 125
Map 6.2. Oil Prospecting Licences and Leases, 1968 126
Map 6.3. Indonesian and Malaysian Oil Concession Activity 128
Map 6.4. Borneo, Stanford, 1903 140
Map 6.4. Enlargement. Borneo, Stanford, 1903. 142
Map 7.1. Confirmation of Cession of Certain Islands by the Sultan of Sulu to British North Borneo, 1903 157
Map 7.2. The Philippine Islands as defined by the Treaty of Peace, 1898, and the Treaty between the U.S. and Spain, 1900 162
Map 7.3. The 1930 Convention. 171

SPELLING OF PLACE NAMES

It should be noted that the documentary and cartographic evidence concerning the relevant area uses different spellings for many of the places mentioned in this Memorial.

For the sake of clarity, the Republic of Indonesia has adopted throughout the Memorial the following spelling for the places most frequently mentioned therein:

Balambangan
Banjermasin
Batoe Tinagat
Berou
Boeloengan
Broershoek
Goenoengtaboer
Island of Nanoekhan
Island of Sebatik
Island of Tarakan
Lahad Datu
Sambalioeng
Sandakhan
Si Amil
Sibuko River and Bay
Tawau
Tidoeng

CHAPTER I

INTRODUCTION

Section 1. The Background to the Case

1.1 This case was brought before the International Court of Justice pursuant to Article 40, para. 1, of the Statute of the Court by joint notification of a Special Agreement which was signed by the Parties on 31 May 1997 at Kuala Lumpur and which entered into force on 14 May 1998[1]. The notification was filed with the Registry on 2 November 1998.

1.2 Article 3, para. 2(a) of the Special Agreement provides that the Parties are simultaneously to exchange Memorials 12 months after the Special Agreement's notification to the Registry. This Memorial is therefore filed in accordance with the Order of the Court dated 10 November 1998 which fixed 2 November 1999 as the date for the filing of the Parties' Memorials in accordance with the provisions of the Special Agreement.

1.3 Article 2 of the Special Agreement provides:

> "The Court is requested to determine on the basis of the treaties, agreements and other evidence furnished by the Parties, whether sovereignty over Pulau Ligitan and Pulau Sipadan belongs to the Republic of Indonesia or to Malaysia."

1.4 Acting on that basis, the Court has been asked by the Parties to decide whether it is the Republic of Indonesia which has sovereignty over Pulau Ligitan or whether it is Malaysia which has such sovereignty; and similarly as regards Pulau Sipadan, the Court is asked whether it is the Republic of Indonesia, or Malaysia, which has sovereignty over it. The Parties are agreed in requesting the Court to decide the questions of sovereignty over each of the two islands as between the two Parties alone, to the exclusion of any other State or outcome.

---

[1] A copy of the Special Agreement may be found in Annex 1, Vol. 2.

1.5 It is significant that the Parties have requested the Court to decide their dispute on the basis of treaties, agreements and other evidence furnished by them. In this Memorial, Indonesia will demonstrate that, following the delimitation of the respective territorial possessions of The Netherlands and Great Britain provided for in the 1891 Anglo-Dutch Convention and the resulting line, title over the islands of Ligitan and Sipadan was vested in The Netherlands. Indonesia, The Netherlands' successor in title, inherited the disputed islands as part of the territory belonging to the former colony of the Netherlands East Indies.

Section 2. Overview of Indonesia's Case and Structure of the Memorial

1.6 Indonesia has brought the present case by special agreement with Malaysia in order to seek a decision from the International Court of Justice that Indonesia, not Malaysia, possesses sovereignty over each of the islands of Sipadan and Ligitan.

1.7 This Memorial is divided into nine chapters. After this Introduction, Chapter II will set out a brief description of the geographic setting where Pulau Ligitan and Pulau Sipadan are situated. These islands lie at some distance offshore north-east Borneo and formed part of the territories of the Netherlands East Indies.

1.8 Chapter III summarises the history of State relations in the region from the time when western powers began to establish a presence in the area to 1969 when the dispute between the Parties crystallised.

1.9 Having reviewed the general historical context, Chapter IV will analyse in greater detail the situation existing in the area prior to the conclusion of the 1891 Anglo-Dutch Convention delimiting Dutch and British possessions in Borneo. Accordingly, after a brief introduction, Chapter IV will discuss first, in Section 2, how the notion of territory was perceived by the local rulers and then, in Section 3, the acquisition of territory by The Netherlands.

1.10 In taking up these matters, Chapter IV will show how the pre-existing local context concerning sovereignty over land territory was different from classical European models. Subsequently, this chapter will describe the uncertainty involved in identifying the precise extent of the territorial cessions made by the local rulers to the colonial powers thus making it necessary for the Dutch and British to delimit these areas by their 1891 Convention.

1.11 In Chapter V, Indonesia will address the legal significance of the 1891 Anglo-Dutch Convention which settled territorial questions between The Netherlands and Great Britain, including questions of sovereignty over the two islands. This chapter will describe how the differences of opinion between the British and Dutch authorities concerning the extent of their respective jurisdictions were resolved by the 1891 Convention.

1.12 Chapter V will analyse, in particular, the background to and terms of the 1891 Convention and will show that the boundary line delimiting the parties' respective territories in the area was not simply a boundary limited to the mainland, but one that extended seaward, across and eastward of the island of Sebatik, thus placing the islands of Ligitan and Sipadan on the Dutch side of the line. This line was illustrated by a contemporaneously prepared official Dutch map that was placed on file in the British archives, and has been reflected in subsequent maps relating to the activities of the British North Borneo Company (BNBC) and Malaysia itself until 1979.

1.13 Chapter VI will demonstrate how the subsequent practice of The Netherlands and Great Britain - and later of Indonesia and Malaysia - confirmed that the boundary established by the 1891 Convention applied both to the mainland and to the islands. Sections 1 and 2 will show how various activities undertaken in the area respected the territorial determination effected by the 1891 line in practice. Section 3 will then analyse the extensive cartographic evidence that supports Indonesia's claims, and will demonstrate how the maps of the Parties, as well as those of third States, confirm the 1891 boundary line as a line attributing Dutch, and subsequently Indonesian, sovereignty over the disputed islands in this case.

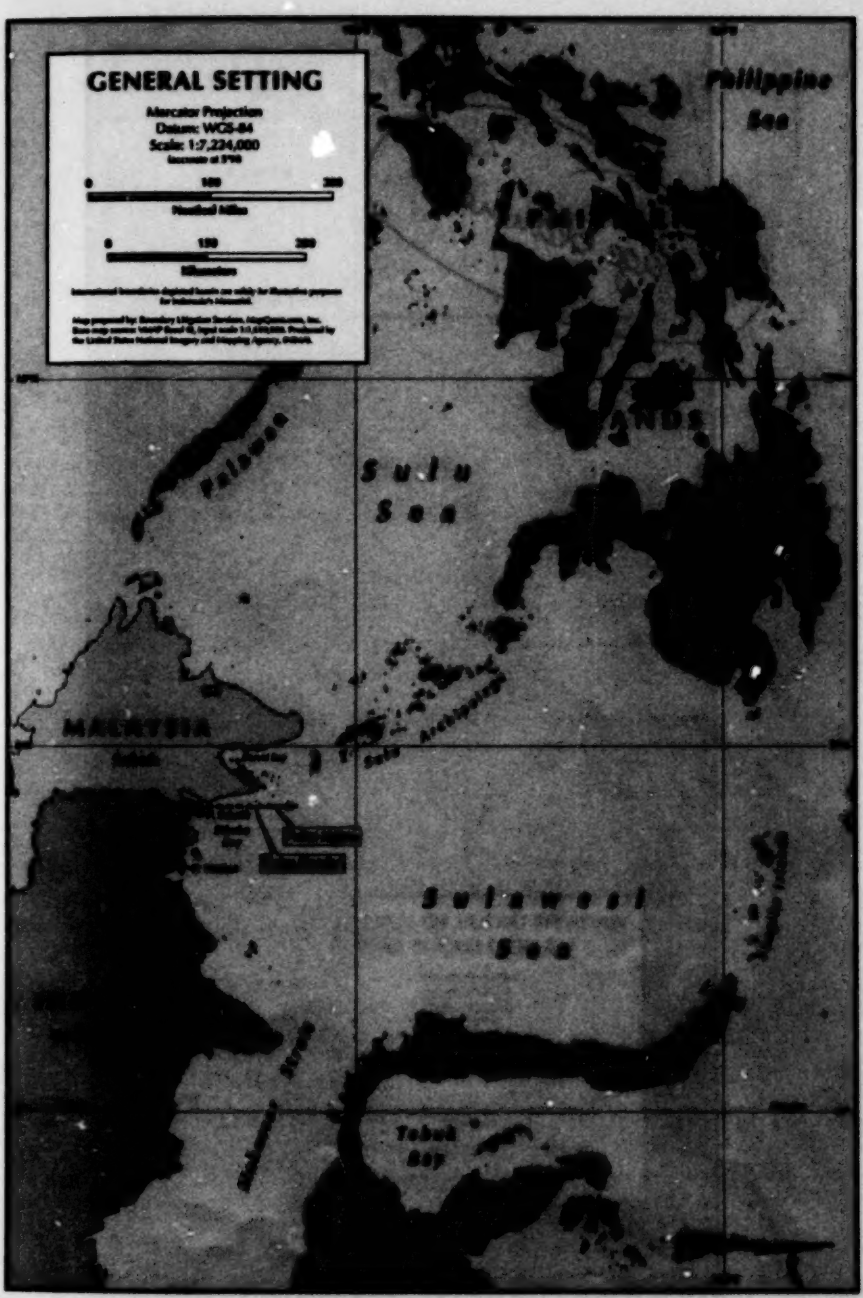
1.14 Chapter VII will describe how the position of third States in the general area has no bearing on the outcome of the present case. Section 1 will review the significance of the Dent and Overbeck concessions, the activities of the BNBC and of Great Britain to show that the disputed islands were not included within the grant to Dent and Overbeck and that Great Britain did not have any sovereign rights over the disputed islands. As for the position of Spain, Section 2 will explain how Spain, and its predecessor the Sultan of Sulu, never considered that Ligitan and Sipadan fell under their sovereignty. Finally, with respect to the position of the United States, Section 3 will show that the conduct of the United States does not indicate that it ever possessed title over the disputed islands after it acquired possession of the Philippine islands from Spain.

1.15 Chapter VIII focuses on the emergence of the dispute in 1969 and subsequent events, with Section 1 examining the 1969 negotiations between the Parties, when the question of sovereig[illegible] over the islands first arose, and Section 2 reviewing the subsequent activities of the Parties after 1969.

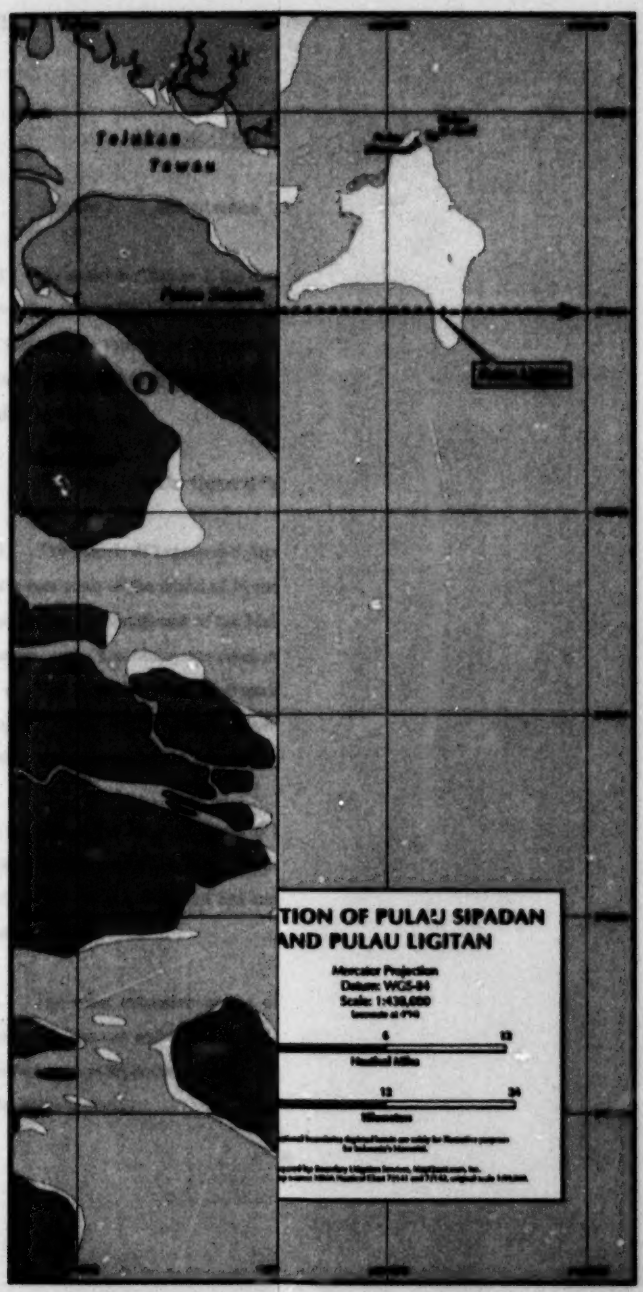
1.16 Finally, Chapter IX contains a summary of Indonesia's case. Indonesia's Submissions are thereafter presented at the end of the Memorial.

1.17 This Memorial is accompanied by four additional volumes (Volumes 2, 3, 4 and 5) containing the documentary evidence relied upon by Indonesia. This documentary evidence has been placed in Annexes and organised chronologically as follows: Volume 2 contains Annexes 1 to 56, Volume 3 contains Annexes 57 to 118, while Volume 4 contains Annexes 119 to 183. Volume 5 contains a number of Affidavits which have been numbered as Annexes A to M.

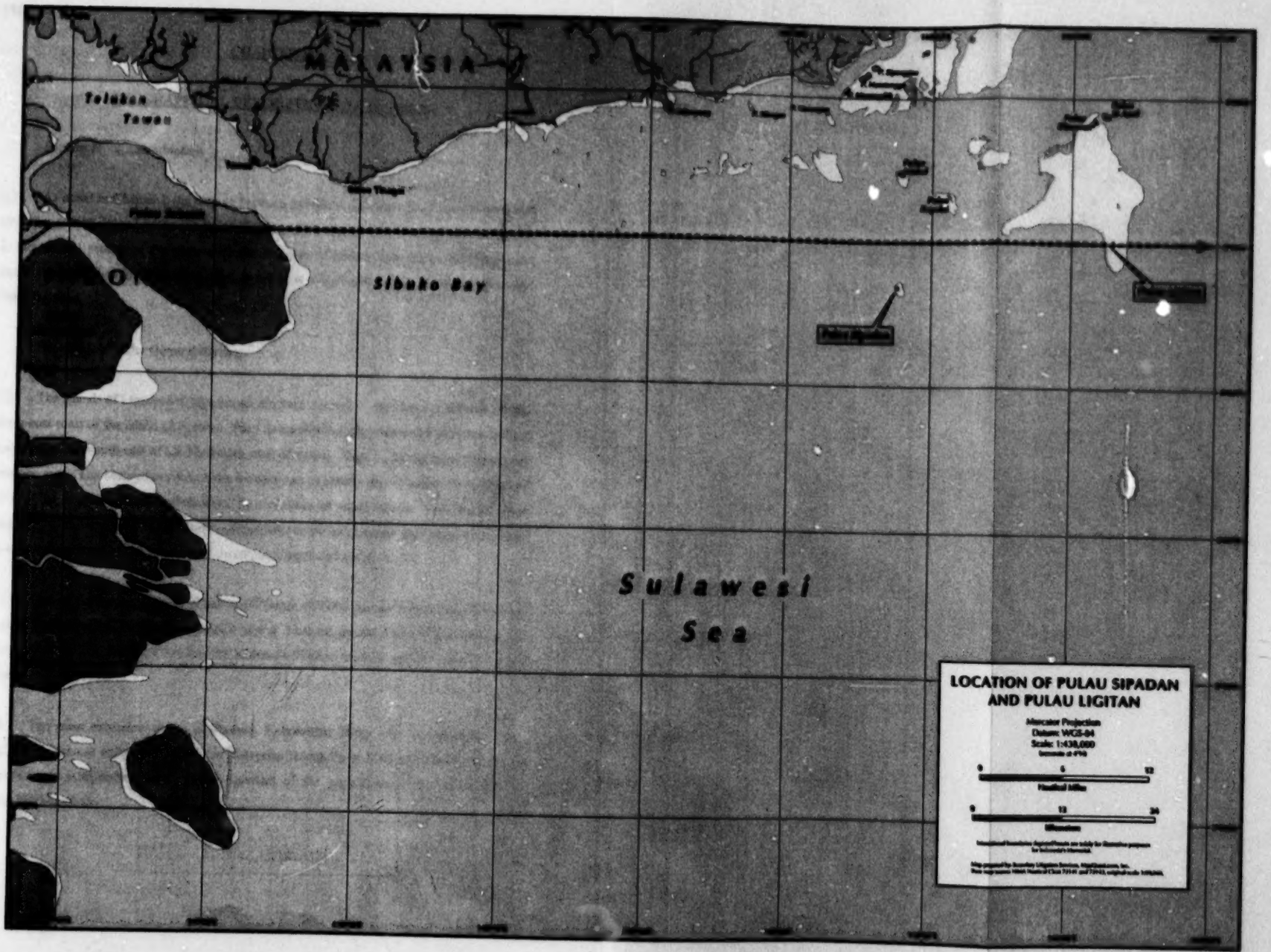
1.18 The Republic of Indonesia also submits with this Memorial a Map Atlas containing maps that are relevant to the dispute. Finally, in accordance with Article 50, para. 2, of the Rules of Court, Indonesia has deposited a number of documents with the Court.


GENERAL SETTING
Mercator Projection
Datum: WGS-84
Scale: 1:7,234,000
Philippine Sea
Palawan
Sulu Sea
MALAYSIA
Sulawesi Sea
Tawau Bay

Map 2.1


Teluk
Tawau
TION OF PULAU SIPADAN
AND PULAU LIGITAN
Mercator Projection
Datum: WGS-84
Scale: 1:438,000
6
12
Nautical Miles
12
24
Kilometers

Map 2.2


MALAYSIA
Tolukan
Tawau
Sibuko Bay
Sulawesi
Sea
LOCATION OF PULAU SIPADAN
AND PULAU LIGITAN
Mercator Projection
Datum: WGS-84
Scale: 1:438,000
0
6
12
Nautical Miles
0
12
24
Kilometers

Map 3.3

CHAPTER II

GEOGRAPHICAL DESCRIPTION OF THE AREA

Section 1. Introduction

2.1 As noted in Chapter I, the dispute between Indonesia and Malaysia concerns territorial sovereignty over Pulau Ligitan and Pulau Sipadan. This chapter will first describe, in Section 2, the general setting of the portion of the Sulawesi (Celebes) Sea where the islands are located and will then, in Sections 3 and 4, move on to a brief description of Pulau Ligitan and Pulau Sipadan.

Section 2. The General Setting

2.2 The islands of Ligitan and Sipadan are situated due east of the island of Sebatik off the north-east coast of the island of Borneo. They lie eastward of the Indonesian province of East Kalimantan and south-east of the Malaysian state of Sabah. Map 2.1 facing page 4 shows the relevant area. The Malaysian coast at the western end of Sibuko Bay is essentially composed of a series of river deltas, characterised by a number of small islands separated by river channels. Similarly, the coast of Indonesia presents some indentations and promontories and is also characterised by the presence of numerous islands and islets.

2.3 One of the largest islands of the world (some 757,000 square kilometres), Borneo is located south-east of the Malay Peninsula and is bounded by the South China Sea on the north, the Sulu Sea, Sulawesi Sea and the Makassar Strait to the east and the Java Sea to the south.

2.4 The most extensive region of Borneo, Kalimantan, forms part of Indonesia. The regions of Sarawak and Sabah joined the Malaysian federation in 1963 and Brunei remains a separate and independent State. Three quarters of the population of the island live in Indonesian territory.

2.5 The Sulawesi Sea fills a steep-sided and flat-bottomed basin formed by downfaulting of a tectonic block. The waters of the Sulawesi Sea are relatively warm and quite deep, the greatest recorded depth being 20,406 feet. Deep water enters the sea from the south of the island of Mindanao, flowing south-west through the Makassar strait. The pattern is the same for surface currents. Weather in the Sulawesi Sea is tropical and controlled by monsoons, which are frequent.

2.6 Pulau Ligitan and Pulau Sipadan lie in the north-western portion of the Sulawesi Sea. As can be seen from Map 2.1, the Sulawesi Sea is bordered on the north by the Sulu Archipelago, the Sulu Sea and the island of Mindanao belonging to the Philippines, on the east by the Indonesian Sangihe islands chain, on the south by the island of Sulawesi (Celebes) and on the west by the island of Borneo.

2.7 Both islands are small and are not associated with any adjoining landmass. Prior to the emergence of the dispute between the Parties, the islands have not had a permanent population or any established settlements. Navigational charts of the area show that lights have been established on each of the islands to assist navigation[1].

Section 3. Pulau Ligitan

2.8 Map 2.2 shows Pulau Ligitan, a very small island, bordered by reefs, and situated on a large coral formation. Pulau Ligitan is mostly sand, but it is permanently above sea level and has a few low bushes and some trees on it. The island is located in the vicinity of a narrow sandbank, which dries up to 1.2 metres (4ft). That part of the island which is permanently above water at high tide is located south of the 4° 10' N parallel of latitude with the southernmost tip of the island located at 4° 9' 35" N latitude and 118° 53' E longitude.

---

[1] See, Maps No. 22, 23 and No. 24 in the Map Atlas.

2.9 The island is situated about 21 nautical miles from the nearest mainland territory, and 77.6 nautical miles from the east coast of Sebatik. Prior to the emergence of this dispute, and, with the exception of seasonal settlements by fishermen, the island itself has never been inhabited[2]. A photograph of the island appears facing page 9[3].

Section 4. Pulau Sipadan

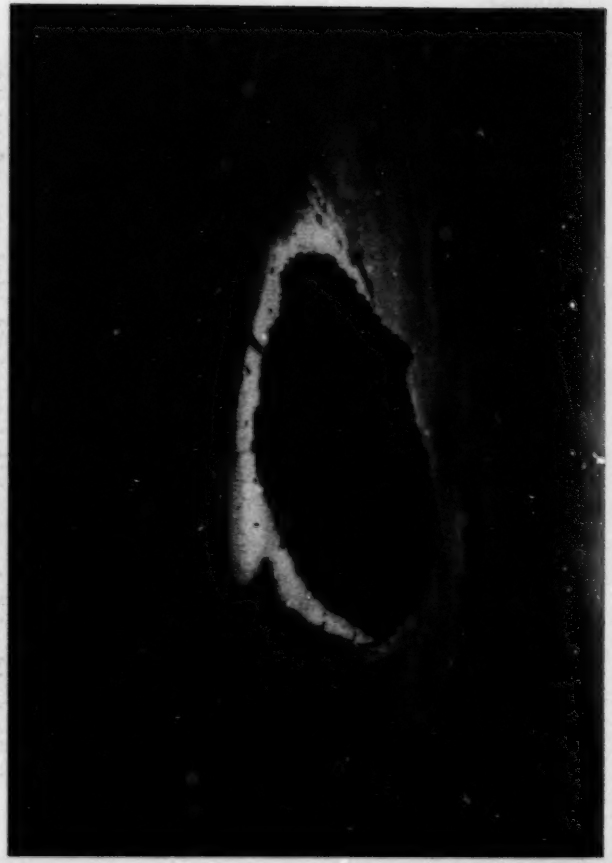
2.10 As illustrated on Map 2.2, Pulau Sipadan lies at 4° 06' 39" N latitude, and 118° 37' 56" E longitude. The island of Sipadan is situated some 15 nautical miles from the nearest mainland coast. As will be explained in Chapter V below, the latitudinal location of the island, as well as of Pulau Ligitan, plays a crucial role in confirming Indonesia's title. The island of Sipadan is relatively small - approximately 0.13 square kilometres - and is densely wooded. Pulau Sipadan is surrounded by deep water, extending to over 500 metres in depth.

2.11 The island is of volcanic origin and it represents the top of a sea-mountain of approximately 600-700 meters in height on whose peak a coral atoll has formed. The island is uninhabited and there is fresh water on it. A photograph of the island appears at the top of the photograph facing page 9.

---

2 See, the affidavits of fishermen discussed in Chapter VI and reproduced in Vol. 5.

3 The island of Ligitan is shown at the bottom of the page; Sipadan is at the top. The photographs date from November 1998 and have been taken from north to south.



CHAPTER III

A SUMMARY OF STATE RELATIONS IN THE AREA (1824-1969)

Section 1. Introduction

3.1 In this chapter, the Government of Indonesia will present an historical overview of the situation on and around the island of Borneo from the mid-19th century, when the western powers began to jockey for a position of predominance in the area, to 1969 when the dispute arose between the Parties.

3.2 The purpose of this chapter is to provide the Court with a brief factual account of the general diplomatic and political history of the area during this period. Subsequent chapters will review discrete historical periods and focus on events which have a particular significance for the present dispute.

Section 2. Relations between the Local Sultanates and Extra-Regional Powers

A. The Sultanates on the Island of Borneo

3.3 As will be reviewed in more detail in Chapter IV, in the 18th century, in the north of the island of Borneo, i.e., the region which is today known as "Sabah", the claims of the Sultans of Sulu and Brunei overlapped[1]. The eastern part of North Borneo was nominally under the control of the Sultan of Sulu, who also ruled over the Sulu Archipelago, today part of the Philippines. The north-western part of the island was more or less under the control of

---

[1] The term "Borneo" in the 19th century was used to indicate both Brunei and Borneo proper and thus would often lead to misunderstandings. Sometimes, treaties concluded by Great Britain with the Sultan of Brunei were referred to as treaties with the Sultanate of "Borneo"; for instance, the Treaty between the United Kingdom and Brunei of 27 May 1847 was called a treaty with "Borneo". See, *Memorandum on the Political, Strategical, and Commercial Advantages to Great Britain of the Northern Part of Borneo; as well as on the Right of Holland, Under the Treaty of 1824, to oppose the Occupation of any portion of that Territory by Great Britain*, by Sir E. Hertslet, dated 4 November 1879, p. 2, Annex 21, Vol. 2.

the Sultan of Brunei. In some instances, local rulers recognised the authority of either sovereign as the situation demanded. When European powers acquired territories in North Borneo in the 19th century they did so through cessions from both the Sultans of Brunei and Sulu and, occasionally, from local rulers[2]

3.4 The precise boundaries of the Sultanates, particularly in the interior of the island which remained largely unexplored, were to a great extent unknown. In some instances, for example in the case of Brunei, the geography of north-west Borneo tended to determine its administrative divisions, with rivers representing the focus of the administrative districts[3].

3.5 The Sultan of Banjermasin ruled over large portions of southern and eastern Borneo – i.e., the area which presently forms the East Kalimantan province of Indonesia. In particular, the region known as Berou, which was composed of the States of Sambalioeng, Goenoengtaboer and Boeloengan, was under the control of the Sultan of Banjermasin[4].

B. Settlements by the Western Powers in Borneo

3.6 During the first half of the 19th century, a number of European powers began to harbour territorial ambitions towards the island of Borneo. While Portugal had limited its interest in the area to sporadic trading expeditions, Spain claimed the Sulu Archipelago, including islands lying in the vicinity of North Borneo, on the basis of a treaty of capitulation that the Sultan of Sulu had signed at the end of a brief war against Spain in 1836[5]. The Spanish claim was disputed by Britain, which argued that the north of Borneo had been ceded to Britain by the Sultan of Sulu under various 18th century treaties[6]. At the time, Great Britain had no immediate territorial ambitions in Borneo, which it simply regarded as important for its trading interests in China and eastern Australia. Even when, in later years, the importance

---

2 Brown, D. E., *Brunei: The Structure and History of a Bornean Malay Sultanate*, The Star Press, Brunei, 1970, p. 76-77.

3 *Ibid.*, p. 79.

4 See, paras. 4.55, *et seq.*, below.

5 See, para. 7.23, below. See, also, Tregonning, K.G., *A History of Modern Sabah*, University of Malaya Press, 1967, p. 22. According to Tregonning, "in the description of the territories of the Sultan in that treaty all mention of North Borneo was excluded...".

6 For a full text of these treaties, see, Annex 2, Vol. 2.

of Borneo became greater for British interests, British influence remained limited to the northern part of the island.

3.7 Of all the European powers, only The Netherlands had successfully established settlements in the western and southern part of the island of Borneo, particularly along the coast, as early as from the end of the 16th century[7]. The Dutch East India Company held a commercial monopoly in the area dating from the end of the 17th century. With the demise of the Dutch East India Company at the end of the 18th century, the whole of its territorial possessions, including the territory of the three States constituting Berou ceded in 1787 by the Sultan of Banjermasin to the Company, were handed over to the Netherlands' Government[8]. Prior to the French Revolution, The Netherlands had thus acquired extensive possessions in South East Asia, including parts of Sumatra, Java and a large portion of the island of Borneo.

3.8 During the Napoleonic wars, Dutch overseas territory fell briefly into the hands of the British and, upon the return of peace, was restored by Great Britain to The Netherlands by the Treaty of 13 August 1814[9]. This Treaty was, however, not sufficient to reassure Britain that The Netherlands would not re-introduce in the area a regime of commercial monopoly which had existed prior to the French Revolution.

3.9 As a result of negotiations relating to the rights and interests of the two States in the area, Britain and The Netherlands signed a new treaty on 17 March 1824[10]. The Treaty contained commercial and territorial provisions. Under Article XII, Great Britain agreed that:

> "...no British establishment shall be made on the Carimon Isles, or on the Islands of Battam, Bintang, Lingin, or on any of the other islands south of the Straits of Singapore, nor any Treaty concluded by British authority with the Chiefs of those islands".

---

7 Irwin, G., *Nineteenth Century Borneo. A Study in Diplomatic Rivalry*, Martinus Nijhoff, 1955, pp. 4-7.

8 Geographical Handbook Series, *Netherlands East Indies*, Naval Intelligence Division, Vol. II, November 1944, p. 70.

9 Memorandum by Sir E. Hertslet dated 4 November 1879, p. 2, Annex 21, Vol. 2. The text of the 1814 Treaty can be found in British and Foreign State Papers, Vol. 1, Part 1 (1812-1814) pp. 370-378.

10 For a copy of the 1824 Treaty, see, Annex 5, Vol. 2.

3.10 In Britain's view, the main purpose of this Treaty was to define the state of the parties' respective jurisdictions in the area and to establish equality of commercial treatment between them.

3.11 Despite its commercial interests in the area, Great Britain had no established settlements in Borneo until the 1840s[11]. At this time, the threat of piracy in the South China Sea and the growing danger for British subjects in the area impressed upon the British Government the need to adopt measures for the protection of British commerce[12]. Accordingly, on 1 November 1844 Britain addressed a letter to the Sultan of Brunei and other Rajahs of Borneo appointing Mr. James Brooke, a British citizen who had been engaged in private trading in the region of Sarawak, as British Agent to Borneo[13]. The letter described Mr. Brooke's mandate as follows:

> "The objects of Her Majesty's Government were stated to Mr. Brooke to be the establishment of a naval station at some point on the north-west coast of Borneo, capable of affording shelter to Her Majesty's ships of war and the trade in general, and possessing the necessary facilities for supplying fuel for Her Majesty's steamers"[14].

3.12 Mr. Brooke received instructions from his Government as to its interpretation of the Anglo-Dutch Treaty of 1824, which included the view that the limitation to entering into treaties with native rulers contained in the Treaty did not apply to Borneo. Thus, Brooke was free to enter into agreements with local rulers to the extent they were not subject to Dutch rule.

3.13 Shortly thereafter, Brooke became interested in the island of Labuan, which was strategically situated in Brunei Bay. The island, which was uninhabited at the time, was under the control of the Sultan of Brunei. Brooke recognised that, given strategic position, Labuan

---

11 The only British trading post established by the East India Company was on the island of Balambangan off the north coast of Borneo in 1763. See, Leong, C., *Sabah, the First 100 Years*, Kuala Lumpur, 1982, p. 36; see, also, Wright, L.R., "Historical Notes on the North Borneo Dispute", *The Journal of Asian Studies*, Vol. XXV, No. 3, pp. 471-484.

12 Memorandum by Sir E. Hertslet dated 4 November 1879, p. 12, Annex 21, Vol. 2.

13 In 1842, the Sultan of Brunei had invested Brooke with the government of the district of Sarawak, bestowing upon him the title of Rajah.

14 Memorandum by Sir E. Hertslet dated 4 November 1879, p. 14, Annex 21, Vol. 2.

could be used as a safe haven for commercial vessels on their way to China and to counter piracy. On 24 December 1846, Labuan became a British colony and James Brooke was appointed the island's first Governor[15].

3.14 The actions of Great Britain in Borneo triggered a protest from the Dutch Government which viewed Britain's actions as contrary to the 1824 Treaty. The British maintained the position that nothing in the 1824 Treaty prevented either party from establishing relations with the chiefs of Borneo and that the limitation contained in the Treaty, which applied to islands lying south of the Straits of Singapore, did not encompass the island of Borneo.

3.15 The Dutch Government's position was that the island of Borneo was not mentioned in the 1824 Treaty because the treaty was based on the principle that the Dutch and British should not jointly occupy the same territory. Given that in 1824, the British were not present in Borneo, the Dutch concluded that their future presence was precluded. In the words of a Dutch diplomat, the Treaty had established:

> "cession en entier par l'un des deux à l'autre de toutes les parties de territoire jusque-là possédées en commun; renonciation réciproque à toute communauté territoriale pour le futur ... si l'Ile de Bornéo n'est pas nommée dans le Traité de 1824, cette omission ne prouve autre chose sinon qu'à cette époque elle n'était pas le théâtre d'une occupation commune"[16].

3.16 Britain's reply to the Dutch proposal was to the effect that:

> "nothing contained in the Treaty of 1824 precluded the formation of British Settlements in that part of Borneo in which the Netherlands did not possess acknowledged rights"[17].

---

15 Leong, *op. cit.*, at fn.11, p. 26.
16 Memorandum by Sir E. Hertslet dated 4 November 1879, p. 20, Annex 21, Vol. 2.
17 *Ibid.*, p. 23.

3.17 Eventually, the Dutch Government chose not to oppose the establishment by a private British enterprise of a presence in the northern reaches of Borneo since it did not believe that these territories were under Dutch control or represented an actual settlement in violation of the terms of the 1824 Treaty[18].

3.18 As will be seen in Chapter IV, in the course of the 1840s the Dutch Government issued a series of decrees regarding its territorial possessions in Borneo. On 28 February 1846, the Governor-General of the Netherlands Indies issued a resolution which regulated the internal organisation of the Dutch possessions on the south, east and west coasts of Borneo by uniting the separate and independent acting Dutch authorities under the control of a central government[19].

3.19 Although its purpose was not to fix political boundaries, the resolution fixed the northern limit of the Dutch administrative divisions at the 3°20' north latitude, or at the river Atas. However, it should be noted that the document reserved any rights that the Dutch Government might have over districts and States situated beyond those specified therein.

3.20 It later became evident to the Dutch Government that the 3°20' N latitude mentioned in the resolution was not correct due to the scant knowledge of the geography of the north-east coast of Borneo at the time. As a result, the resolution was subsequently modified by a decree of 27 August 1849[20]. Further communications by the Dutch Minister of the Colonies to the Netherlands States-General in 1850, which were published, show that the Boeloengan territories over which The Netherlands enjoyed sovereign rights extended as far north as the 4°20' N latitude in the vicinity of Batoe Tinagat, a location that can be seen on Map 3.1 facing this page[21].

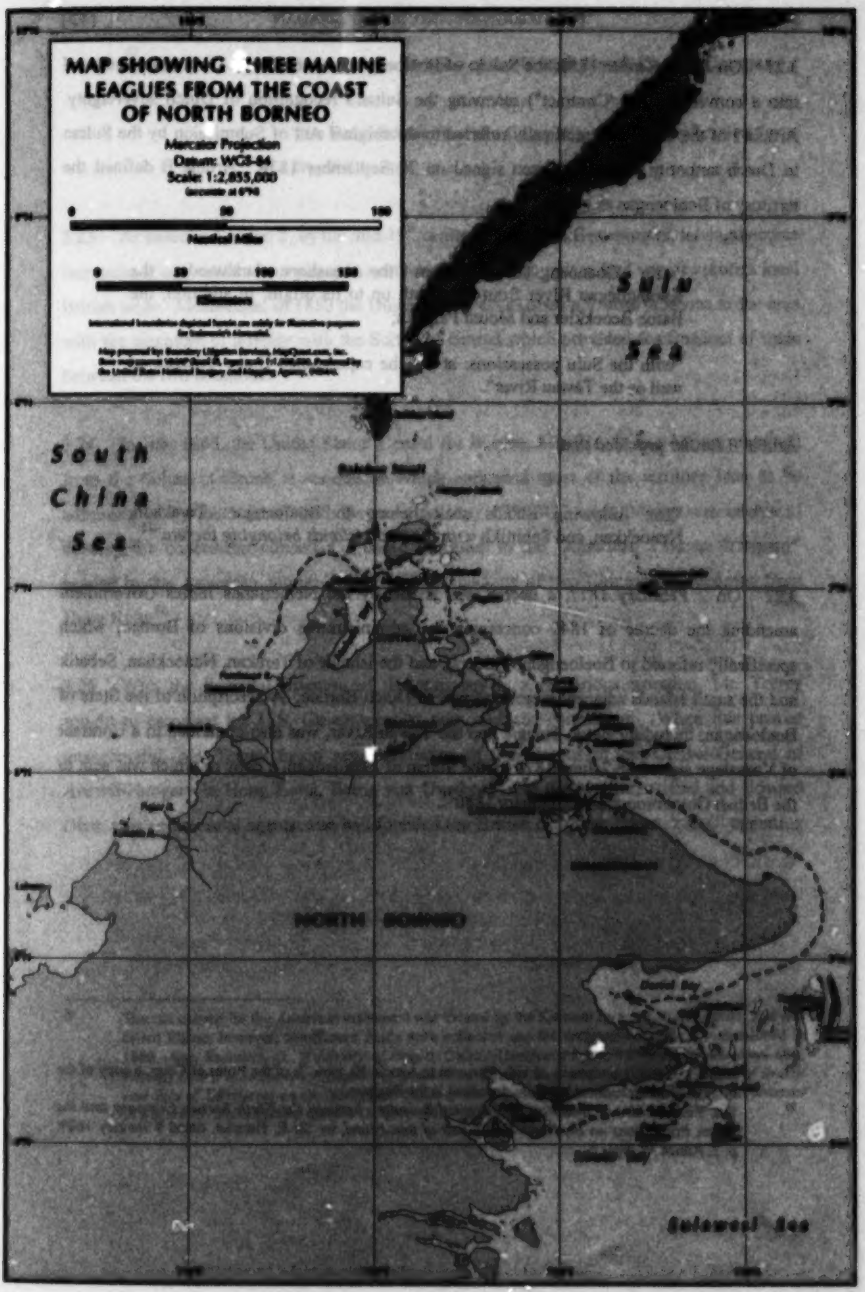
---

18 Extract from Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880, Annex 22, Vol. 2.

19 For the text of the resolution, see, Annex 10, Vol. 2.

20 Annex 12, Vol. 2.

21 See, Record of the Proceedings of the Joint Commission Meeting on 19 July 1839, p. 2, Annex 58, Vol. 3.


MAP SHOWING THREE MARINE LEAGUES FROM THE COAST OF NORTH BORNEO
Mercator Projection
Datum: WGS-84
Scale: 1:2,855,000
Nautical Miles
Kilometers
Sulu Sea
South China Sea
NORTH BORNEO
Sulawesi Sea

Map 3.1

3.21 On 12 November 1850, the Sultan of Boeloengan and the Dutch Government entered into a convention (or "Contract") renewing the Sultan's recognition of Dutch sovereignty. Article I of the Contract specifically referred to the original Act of Submission by the Sultan to Dutch authority which had been signed on 27 September 1834. Article II defined the territory of Boeloengan as lying:

> "with Goenoeng-Teboer: from the seashore landwards, the Karangtiegau River from its mouth up to its origin; in addition, the Batoe Beoekkier and Mount Palpakh;
>
> "with the Sulu possessions: at sea the cape named Batoe Tinagat, as well as the Tawau River".

Article II further provided that:

> "The following islands shall belong to Boeloengan: Terakkan, Nenoekkan, and Sebittikh *with the small islands belonging thereto*"[22].

3.22 On 2 February 1877, a decree was issued by the Netherlands Indies Government amending the decree of 1849 concerning the administrative divisions of Borneo, which specifically referred to Boeloengan, Tidoeng, and the islands of Tarakan, Nanoekhan, Sebatik and the small islands adjacent thereto, as part of Dutch Borneo. A description of the State of Boeloengan, including Batoe Tinagat and the Tawau River, was also contained in a Contract of Vassalage signed on 2 June 1878 by the Sultan of Boeloengan, a copy of which was sent to the British Government on 17 January 1880[23].

---

[22] Annex 13, Vol. 2 (emphasis added). Pursuant to Article 50, para. 2, of the Rules of Court, a copy of the original Dutch document has been deposited in the Registry.

[23] See, *Further Memorandum on the Disputed Boundary between the North Borneo Company and the Dutch Possessions on the North-East Coast of that Island*, by Sir E. Hertslet, dated 9 January 1889, p. 2, Annex 38, Vol. 2.

Section 3. An Overview of the Origins of the British North Borneo Company

A. The Establishment of the Company and Its Application for a Royal Charter

3.23 As noted in Section 2, by the mid-19th century the British Government, having become increasingly concerned about piracy in north-west Borneo, sought to find ways to protect local British trade. Meanwhile, in 1850 the United States established a formal presence in the area with the signature of a treaty with the Sultan of Brunei which provided for freedom of trade between the two countries.

3.24 In July 1865, the United States' Consul for Borneo, Mr. Claude Lee Moses, obtained from the Sultan of Brunei a concession which embraced most of the territory later to be administered by the British North Borneo Company ("BNBC"). Mr. Moses was unable to develop the concession himself and ceded the grant to the "American Trading Company" headed by the American Joseph Torrey with the backing of two Chinese businessmen from Hong Kong[24].

3.25 With the financial situation of the company in a precarious situation, Mr. Torrey sought to convince the U.S. Government to take over the concession. When this proved unsuccessful, Mr. Torrey found new purchasers in the persons of the Consul-General of Austria-Hungary in Hong Kong, Baron von Overbeck, and the brothers Alfred and Edward Dent, two commercial agents who had founded the British company "Dent & Co." operating

---

[24] The site chosen for the American settlement was located by the Kimanis river, north of Labuan, and was called Elliana; however, insufficient funds were collected and the settlement was finally abandoned in 1866. See, Saunders, G., *A History of Brunei*, Oxford University Press, 1994, pp. 83-86. See, also, Foreign Office *Memorandum Respecting Cessions to Messrs. Dent and Overbeck by Sultans of Brunei and Sulu of Territories on the North-East Coast of Borneo, and Position of Her Majesty's Government in Regard to Such Cessions* dated 6 October 1879, pp. 288-289, Annex 20, Vol. 2.

out of London and Shanghai. The new concession was an assignment of the original concession to the American company[25].

3.26 On 29 December 1877, the Sultan of Brunei agreed to issue three separate grants to Messrs. Dent and Overbeck encompassing a large area of North Borneo (some 28,000 square miles of territory) in exchange for a total annual payment of $15,000[26].

3.27 Since this grant included a portion of territory along the east coast of Sabah which was also claimed by the Sultan of Sulu, Baron von Overbeck deemed it prudent to enter a separate agreement with that ruler as well. In the words of the British Acting Consul-General in Labuan, Mr. Treacher:

> "The Sultan of Brunei's territory extends, at the utmost, only to the west side of Malludu Bay, though formerly the Brunei kingdom extended as far as Cape Kaniungan, on the east coast, in latitude 1° north. The remaining territory mentioned in the grants is actually under Sulu rule, and occupied by Sulu Chiefs, and it was only because the districts were mentioned in the original American grants that they are again included, and Mr. Overbeck will now have to make a separate agreement with the Sultan of Sulu for them"[27].

3.28 On 22 January 1878, the Sultan of Sulu agreed to transfer to Dent and Overbeck for an annual payment of $ 5,000 a concession to the territory described as follows:

> "... all the territories and lands being tributary to us on the mainland of the Island of Borneo, commencing from the Pandassan River on the west coast to Maludu Bay, and extending along the whole east coast as far as the Sibuco River in the south, comprising all the provinces bordering on Maludu Bay, also the States of Pietan, Sugut, Bangaya, Labuk, Sandakan, Kinabatangan, Mamiang, and all the other territories and states to the southward thereof, bordering on Darvel Bay and as far as the Sibuco River, with all the islands belonging thereto within three marine leagues of the coast"[28].

---

25 Memorandum by Sir J. Pauncefote dated 7 May 1878, p. 130, Annex 18, Vol. 2.

26 See, Despatch from Acting Consul-General Treacher to the Earl of Derby, with inclosure, dated 2 January 1878, pp. 101-103, Annex 16, Vol. 2.

27 *Ibid.*, p. 101.

28 For the original Agreement, see, inclosure to the despatch from Consul-General Treacher to the Earl of Derby dated 22 January 1878, pp. 108-109, Annex 17, Vol. 2.

Map 3.1 facing page 14 illustrates the distance of three marine leagues (equivalent to nine nautical miles) from the mainland coast of North Borneo in accordance with the 1879 concession.

3.29 Following these transfers, the Dent and Overbeck syndicate established a presence in Sabah. In early 1878, two "residents" were established on the west coast on the Tempasuk and Papar rivers and one on the east coast at Sandakhan Bay.

3.30 The Dent brothers and Baron von Overbeck were not familiar with the territory over which their concession extended and left the responsibility of day-to-day administration of their trade to the residents. They intended to sell their interests to whomever was interested in their commercial or political value. The British Foreign Office, for its part, though not willing to establish a British Protectorate over the territory, was reluctant to see another power obtain possession of the area or exert influence over it[29].

3.31 Unable to sell its concessions, the Dent and Overbeck partnership began to assess the practicability of developing them on a commercial basis. Accordingly, the Dent brothers addressed a petition to the British Government for a Royal Charter to administer the territory and exploit its resources.

B. Dutch and Spanish Reactions and British Reassurances

3.32 The application for a Royal Charter triggered protests from the Dutch Government which sought, and obtained, reassurances, that Britain did not advance any claims of sovereignty over the area[30].

3.33 As noted above, Spain also claimed the possessions of the Sultan of Sulu in North Borneo following a treaty concluded in 1851 with the Sultan of Sulu[31]. Great Britain,

---

29 *Notes on the North Borneo Charter* by Sir J. Pauncefote dated January 1882, p. 14, Annex 34, Vol. 2.
30 See, paras. 7.6-7.7, below.
31 See, para. 3.6, above.

however, continued to reject Spanish claims to Sulu and its dependencies as "merely a nominal claim over a certain undetermined part of Borneo"[32].

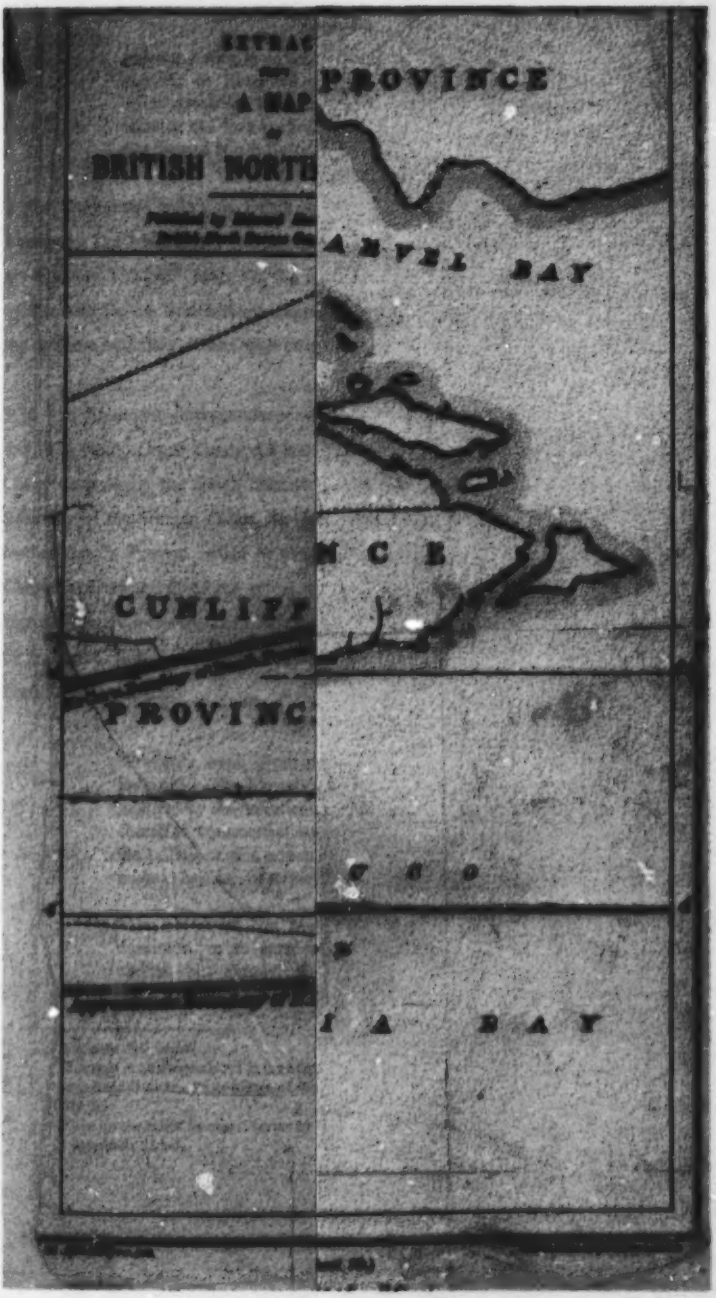
3.34 It was not until March 1885 that Great Britain, Germany and Spain signed a protocol pursuant to which the former two States recognised Spanish sovereignty over the Sulu Archipelago, in return for a renunciation by Spain of any claim over north-eastern Borneo[33]. The relevant articles of the 1885 Protocol read as follows (in the original French):

> "Art. 1er. Les Gouvernements de l'Allemagne et de la Grande Bretagne reconnaissent la souveraineté de l'Espagne sur les points occupés effectivement, ainsi que sur ceux qui ne le seraient pas encore, de l'Archipel de Sulu (Joló), dont les limites sont établies dans l'article 2.
> "Art. 2. L'archipel de Sulu (Joló), conformément à la définition contenue dans l'art. 1er. du Traité signé le 23 Septembre 1836 entre le Gouvernement Espagnol et le Sultan de Sulu (Joló), comprend toutes les îles qui se trouvent entre l'extremité occidentale de l'île de Mindanao, d'une part, et le continent de Bornéo et l'île de Paragua, de l'autre, à l'exception de celles qui sont indiquées dans l'art. 3.
> "Il est entendu que les îles de Balabac et de Cagayan-Joló font partie de l'Archipel.
> "Art. 3. Le Gouvernement Espagnol renonce vis-à-vis du Gouvernement Brittanique, à toute prétention de souveraineté sur les territoires du continent de Bornéo qui appartiennent, ou qui ont

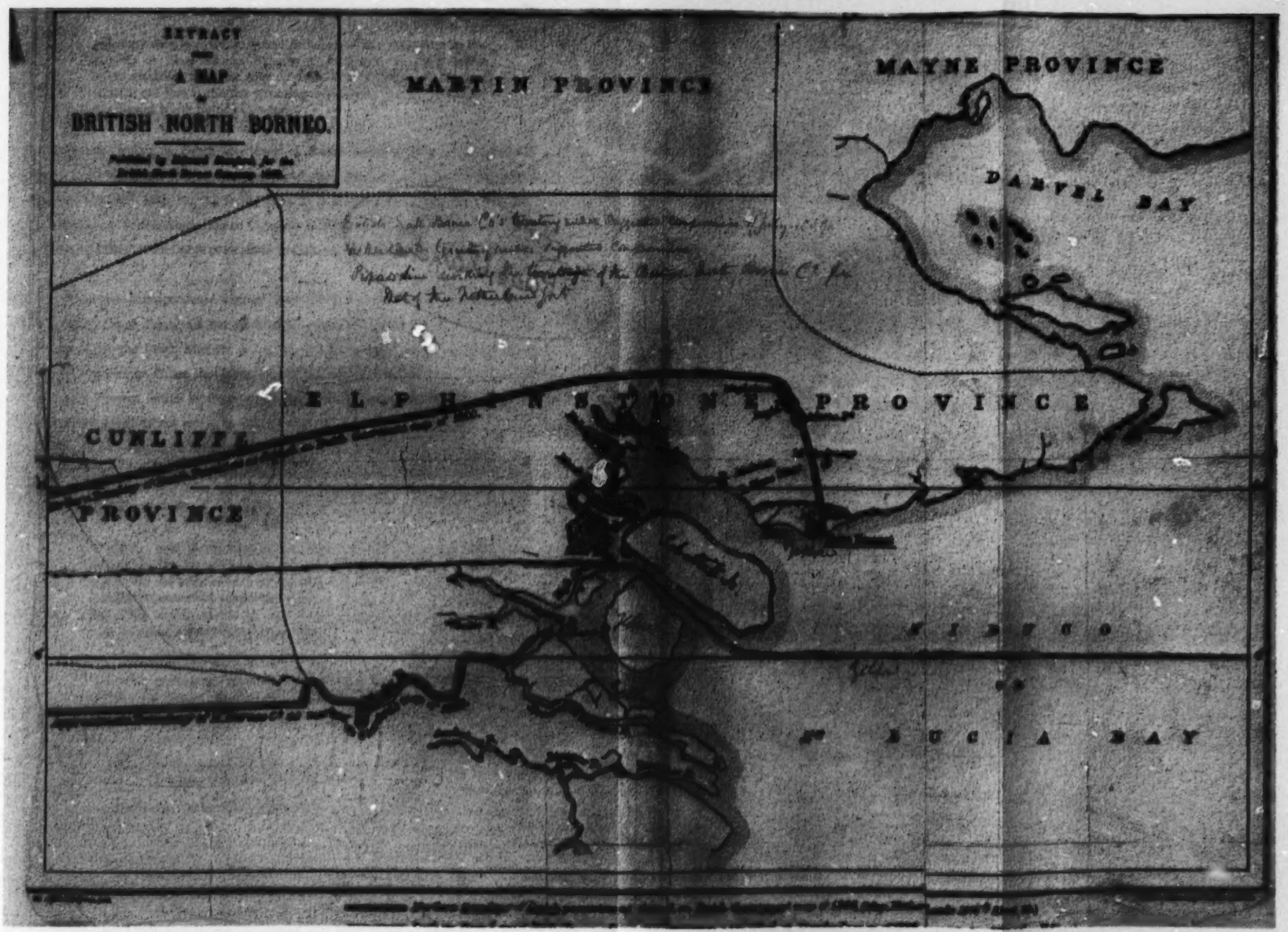
---

32 See, *Notes on the North Borneo Charter* by Sir J. Pauncefote dated January 1882, p. 24, Annex 24, Vol. 2.

33 Tregonning, *op. cit.*, at fn. 5, p. 22. The text of the 1885 Protocol is contained in Annex 33, Vol. 2. The following translation of the Protocol, reproduced in the same annex, was prepared by the British Foreign Office:
"Article I. The Government of Great Britain and Germany recognize the sovereignty of Spain over the places effectively occupied as well as over those places not yet so occupied, of the archipelago of Sulu (Joló), whereof the boundaries are determined in Article II.
Article II. The Archipelago of Sulu (Joló), conformably to the definition contained in Article 1 of the Treaty signed the 23rd of September 1836, between the Spanish Government and the Sultan of Sulu (Joló) comprises all the islands which are found between the western extremity of the island of Mindanao on the one side, and the continent of Borneo and the Island of Paragua (Palawan) on the other side, with exception of those which are indicated in Article III. It is understood (entendu) that the island of Balabac and of Cagayan-Joló form part of the Archipelago.
Article III. The Spanish Government relinquishes as far as regards the British Government, all claim of sovereignty over the territories of the Continent of Borneo which belong, or which have belonged in the past to the Sultan of Sulu (Joló), including therein the neighboring Islands of Balambangan, Banguey and Malawali, as well as all those islands lying within a Zone of three marine leagues along the coasts and which form part of the territories administered by the Company styled 'British North Borneo Company". Spanish rule over the Sulu Archipelago was however short-lived, since, as we shall see in paras. 7.30-7.37, following the Spanish-American war, these islands became a possession of the United States.



Map 12


EXTRACT
FROM
A MAP
OF
BRITISH NORTH BORNEO.
MARTIN PROVINCE
MAYNE PROVINCE
DARVEL BAY
PROVINCE
CUNLIFFE
PROVINCE
SIBUCO
SUCCIA BAY

Map 2.2

> appartenu dans le passé, au Sultan de Sulu (Joló), y comprises les îles voisines de Ba..mbangan, Banguey et Malawali, ainsi que toutes celles comprises dans une zone de trois lieues maritimes le long des côtes et qui font partie des territoires administrés par la Compagnie dite 'British North Borneo Company'.

3.35 During this period, the Dutch were firmly established along the south coast of Borneo. Moreover, The Netherlands also advanced territorial claims in the northern part of the island up to Batoe Tinagat[34]. Map No. 3.2 facing page 21 is a reproduction of a map published by Stanford for the British North Borneo Company in 1888 showing by means of a red line the northern boundary of the Dutch possessions as claimed on a Dutch official map of 1885[35].

3.36 In diplomatic correspondence with the Dutch, Great Britain continued to maintain that the 1824 Anglo-Dutch Treaty did not apply to the island of Borneo. In September 1878, Count de Bylandt, the Dutch Minister in London, handed a note to the Permanent Under Secretary of the Foreign Office, Sir Julian Pauncefote, setting forth the legal rights of The Netherlands[36]. Pressed further by Count de Bylandt with respect to the request for a Royal Charter by Dent and Overbeck and as to Britain's intentions concerning north-east Borneo, the British Foreign Secretary, Lord Salisbury, replied that his Government respected the rights of the Sultans of Sulu and Brunei and did not intend to do anything in derogation of those rights. Lord Salisbury added:

> "Probably, even if our response to Messrs. Dent and Overbeck was favourable, Her Majesty's Government would not go further than was justified by the precedents of Sir James Brooke at Sarawak, or of those chartered commercial companies which in former times it had been the policy of this country to establish in various parts of the world *without any aim of territorial acquisition.*
>
> "The object of Her Majesty's G..vernment was not to set up any dominion, or to enter upon con..oversy with respect to territorial claims, but simply, if we saw an opportunity, to promote the development of the resources of the country under discussion"[37].

---

34 See, para. 5.9, below.

35 This map is also reproduced in the Map Atlas as Map No. 3.

36 See, Record of the Proceedings of the Joint Commission Meeting on 19 July 1889, p. 4, Annex 38, Vol. 3.

37 *Notes on the North Borneo Charter* by Sir J. Pauncefote dated January 1882, pp. 12-13, Annex 24, Vol. 2 (emphasis added).

3.37 In any event, the Netherlands Government was not unduly concerned by the company's activities in North Borneo since, as the Dutch Colonial Minister noted in reply to an enquiry raised by the Parliament in 1880, this was "simply a question of the establishment of a private Company". Moreover, the Minister felt that the Dutch interests had not been affected by the grants. As the Minister observed:

> "... there is, as it appears, little reason to apprehend any such danger from the undertaking in question, and it would be difficult to prove that our rights have been infringed by the concessions which have been granted"[38].

3.38 Nonetheless, in order to confirm the limits of Dutch possessions in the area, the Dutch flag was hoisted in 1879 at Batoe Tinagat to show that Dutch territories extended as far north as that location[39]. Upon an inquiry by Great Britain, the Dutch Colonial Minister explained his Government's position as follows:

> "As far as the Sulu concession is concerned it is not quite certain whether the contracting parties were well acquainted with the precise frontier-line of the Netherlands territory on the east coast of Borneo. With a view to preventing possible misapprehensions, orders have been issued for the Netherlands flag to be hoisted on the border (on the Batoo Tinagat Rock, situated at the mouth of the Tinagat River in 4°19" north latitude and 117°51" east longitude, according to the last survey) to be placed for the present under the protection of a cruizer, whilst the Sultan of Boloengau [sic] has been requested to maintain a Representative at this point on his side of the frontier-line in question"[40].

3.39 The exact location of Batoe Tinagat was a matter of some disagreement; the Dutch placed it at 4°19' N latitude, while the British believed that it was situated at 4°15' N.

---

[38] *Extract from the Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880*, Annex 22, Vol. 2.

[39] Letter from the British North Borneo Company to the Foreign Office dated 8 March 1889, Annex 46, Vol. 2. For a further discussion of this point, see, para. 5.4, below.

[40] *Extract from the Answer of the Colonial Minister to Inquiries made by the Committee of the Second Chamber in their Preliminary Report on the Netherlands Indian Budget for 1880*, Annex 22, Vol. 2.

3.40 On 12 April 1880, Mr. Dent wrote to Lord Salisbury stressing the importance of his company's activities to promote the development of the area and noting the progress that had been made since December 1877 when the first agents were established in Sabah. He added that, if the territory could not be occupied by Britain, it should be administered by his company with sovereign title remaining with the local Sultans[41].

3.41 In internal communications, the Foreign Office recognised that Great Britain had no sovereign title over the territory where the company was established and thus could not grant it governmental or jurisdictional powers. As was noted by the British Foreign Office:

> "In the case of Borneo, the Crown has no dominion over the territory, and would grant absolutely nothing but *Incorporation*. The grant of the Charter, nevertheless, would be the formal recognition of the title of Mr. Dent and his Association to the territories ceded to him by the Sultans"[42].

3.42 It should be noted, incidentally, that the reference to a cession was not intended to mean a full transfer of sovereign rights from the Sultans to the Dent and Overbeck company, since the interpretation of the Foreign Office was that the latter would exercise its jurisdiction "in the name of the Sultans of Sulu and Brunei, under whose suzerainty they hold the territory"[43]. In other words, the Foreign Office insisted that:

> "...the terms of the proposed Charter will not have the effect of vesting in Her Majesty the sovereignty over the territory in question, in virtue of the rights thereby recognized by her as acquired by a Company of British subjects from the Sultans of Brunei and Sulu; but that the Sultans will remain Suzerains although they have delegated the exercise of authority within those territories to the Company"[44].

---

41 *Notes on the North Borneo Charter* by Sir J. Pauncefote dated January 1882, p. 13, Annex 24, Vol. 2.
42 *Ibid.*, p. 16 (emphasis in the text).
43 *Ibid.*, p. 15.
44 *Ibid.*, p. 18.

3.43 Throughout its discussions with the Dutch Government, Britain also maintained that the company was a "private undertaking" which:

> "...promised to open up an important field to commercial enterprise, to the manifest advantage of the native population, and certainly not to the detriment of the neighbouring territories under Netherlands rule"[45].

3.44 The Charter was granted to the company in November 1881[46]. A few months earlier, Dent had appointed Treacher as the first Governor of the company. As for Baron von Overbeck, by that time he had given up all of his rights to, and relinquished any interest in, the company which remained an exclusively British concern[47]. In May 1882, the Chartered company was officially formed under the name of British North Borneo Company ("BNBC") and, in 1883, Treacher moved the company's headquarters to Sandakhan[48].

3.45 The BNBC's Charter stipulated a policy of respect of the local customs and internal affairs[49]. Historical studies of the BNBC's administration confirm that the Residents were careful not to interfere in the life of the indigenous populations. Notably, judicial administration over the natives was exercised by their own chiefs and headmen and carried out by the village courts in accordance with local customs. Similarly, the collection of taxes was carried out by local chiefs and other native collectors[50]. In any event, even if the BNBC had wanted to carry out a different strategy, it lacked both the staff and the financial resources to administer properly such a vast and diverse expanse of land[51].

---

45 *Ibid.*, p. 30.

46 For the text of the Royal Charter see, Extract from *The London Gazette*, 8 November 1881, Annex 23, Vol. 2.

47 Black, I., *A Gambling Style of Government. The Establishment of the Chartered Company's Rule in Sabah, 1878-1915*, Oxford University Press, Oxford, 1983, p. 30.

48 Tregonning, *op. cit.*, at fn. 5, p. 49.

49 Annex 23, Vol. 2, items 8, 9 and 10.

50 Tregonning, *op. cit.*, at fn. 5, pp. 118-119.

51 Warren, J. F., *The Sulu Zone 1768-1898*, Singapore University Press, Singapore, 1981, p. 135.

C. The Administrative Divisions of the British North Borneo Company

3.46 Initially, the division of North Borneo into two residencies, the West and East Coast Residencies, introduced by Baron von Overbeck, was maintained. Over the years, the number of residencies rose to five in the 1920s, (the West Coast, Kudat, Sandakhan, the East Coast and the Interior), then fell to four in 1934, (Sandakhan, West Coast, Interior and Tawau), and, finally, shortly before World War II, to the original two (the East and West Coast residencies)[52].

3.47 Each residency was internally divided into provinces administered by District Officers. The Heads of Departments resided in Sandakhan, at the BNBC's headquarters, which became the capital of British North Borneo, while the West Coast Residency was based in Jesselton (today Kota Kinabalu, the capital of Sabah)[53].

3.48 On 12 May 1888, the British Government entered into an agreement with the BNBC to establish the State of North Borneo. The agreement made the State of North Borneo, like Brunei and Sarawak, a British protected State, with the British Government assuming responsibility for its external relations with foreign States[54]. The Agreement did not contain a specific description of the territories comprising the State of North Borneo, but simply referred back to the territorial description contained in the Royal Charter.

---

52 Leong, *op. cit.*, at fn. 11, pp. 54-55. See, also, Rutter, O., *British North Borneo. An Account of its History, Resources and Native Tribes*, London, 1922, p. 6.

53 Tregonning, *op. cit.*, at fn. 5, pp. 49 *et seq.* In the 1920s the provinces were replaced by seventeen districts (Leong, *op. cit.*, at fn. 11, p. 55, fn. 52).

54 The text of the Agreement is at Annex 34, Vol. 2.

3.49 Under the Agreement, the State of North Borneo was divided into nine provinces, namely:

1. Province Alcock;
2. Province Cunliffe;
3. Province Dent;
4. Province Dewhurst;
5. Province Elphinstone;
6. Province Keppel;
7. Province Martin;
8. Province Mayne; and
9. Province Myburgh[55].

3.50 Map 6.4, with an enlargement of the relevant portion facing page 120, shows the internal divisions of the State of North Borneo into the nine provinces listed above as of 1903[56]. As can be seen from the enlargement, the southernmost limits of the Elphinstone Province coincided with a line drawn seawards from the island of Sebatik along the 4° 10' N parallel of latitude – a line that was established by the 1891 Anglo-Dutch Convention, as will be discussed in Chapter V. The relevance of this line for the purposes of the present case will be addressed in subsequent chapters.

3.51 The political control of the State of North Borneo lay with the BNBC's Court of Directors in London. In practice, the Court of Directors delegated its powers to a Governor residing in Sandakhan who was advised, from 1912, by a Legislative Council[57].

3.52 By an agreement of 26 June 1946, the BNBC ceded its rights and assets to the British Crown and North Borneo was created as a British Colony. In November 1946, Edward Francis Twining was appointed first Governor of the British Colony of North Borneo[58].

---

55 *Ibid.*, Art.1. The provinces were named after prominent BNBC officials.

56 This map has also been reproduced as Map No. 9 in the Map Atlas.

57 For further details on the administration of the State of North Borneo, see, Kahin, G. McT., "The State of North Borneo, 1881-1946", *The Far Eastern Quarterly*, Vol. VII, November 1947, pp. 43-65, at pp. 47-49.

58 *Ibid.*, pp. 62-65.

Section 4. Dutch-British Relations from 1882 to the Signature of the 1891 Convention

3.53 Chapter V will examine in detail the terms of, and background to, the 1891 Anglo-Dutch Convention. Here, it will suffice to describe briefly from a factual perspective the events leading to the signature of the Convention.

3.54 As mentioned above, in a number of diplomatic communications with the British in 1882, the Dutch authorities had maintained the position that the northern limit of the Dutch possessions on the island of Borneo was situated on the promontory of Batoe Tinagat, at approximately 4°20' N latitude. The British, on the other hand, argued that the Dutch boundary did not extend beyond the 3°20' N latitude referred to in the Dutch resolution of 28 February 1846[59].

3.55 The Dutch position was that it was not correct to refer to the Dutch resolution of 1846 as marking the final boundary of the Dutch possessions in Borneo since that resolution had in fact been subsequently modified in 1849 with a further decree suppressing the mention of a frontier at the 3° 20' north latitude. To that effect, an announcement had been made by the Dutch Colonial Minister to the Dutch Parliament on 18 June 1850 specifying that the resolution of 1846 had been modified[60].

3.56 Nonetheless, the difference of opinion between the Dutch and British convinced both Governments that it was necessary to open negotiations with a view to discussing the boundary question as a whole. With the establishment of a British protected State in Borneo in 1888, the need for a settlement of the boundary dispute became more urgent.

---

[59] See, paras. 3.18-3.20, above. See, also, letter from British North Borneo Company to the Foreign Office dated 8 March 1889, Annex 46, Vol. 2.

[60] *Memorandum on the Dutch Frontier on the North-east Coast of Borneo* by Sir E. Hertslet dated 20 June 1882, p. 1, Annex 28, Vol. 2.

3.57 Following a number of exchanges and informal meetings, the parties agreed to set up a Commission in London composed of an equal number of delegates from both countries to discuss the frontier between Dutch territories in Borneo and those under British protection.

3.58 The Joint Commission met at the British Foreign Office in July 1889. The parties rapidly reached an agreement in principle that the boundary would start on the east coast from a location called Broershoek, at the 4° 10′ N parallel of latitude[61]. The only substantive point of contention remained the issue of sovereignty over the island of Sebatik which lay opposite the coast at Broershoek. On that point it was finally agreed that the line should, from Broershoek, continue its course across Sebatik and thence eastwards (i.e., seaward) along that parallel of latitude, dividing the island of Sebatik between the parties[62]. The Convention was signed on 20 June 1891.

3.59 An official Dutch map reflecting the agreed boundary was attached to the Explanatory Memorandum (sometimes referred to as the "Memorandum of Elucidation") presented by the Dutch Government to the Second Chamber of the Netherlands States-General as part of the ratification process of the 1891 Convention[63]. This map, a copy which appears as Map No. 5 in the Map Atlas and which is discussed at paras. 5.48 –5.55, below, shows by a red line the boundary agreed under the 1891 Convention. This line extended well into Sibuko Bay along the 4° 10′ N latitude.

3.60 Moreover, as will also be explained in Chapter V, this map was never protested by Britain at the time it was issued or at any time later despite the fact that it had been communicated to the British authorities. Indeed, subsequent British and Malaysian maps were

---

61 See, paras. 5.26-5.27, below. The BNBC also agreed to this position, as can be seen from the *Memorandum on the Southern Boundary of the Territory of the British North Borneo Company* dated 22 July 1890, Annex 61, Vol. 3.

62 Despatch from Lord Salisbury to Count de Bylandt dated 13 August 1890, p. 13, Annex 62, Vol. 3.

63 Annex 77, Vol. 3. Pursuant to Article 50, para. 2, of the Rules of Court a copy of the original Dutch document (as part of a complete set of Dutch parliamentary documents relating to the ratification of the Convention of 20 June 1891) has been deposited in the Registry. See, also, the despatch from Sir Horace Rumbold to Lord Salisbury dated 26 January 1892, Annex 81, Vol. 3. The Convention was ratified by the Dutch Parliament on 9 April 1892; in this respect, see, Decree of 20 May 1892, Annex 88, Vol. 3; see, also, despatch from Sir Horace Rumbold to Lord Salisbury dated 9 March 1892, Annex 83, Vol. 3.

consistent with the map attached to the Explanatory Memorandum in showing a boundary extending beyond Sebatik out to sea along the 4°10′ N latitude[64].

3.61 Article V of the 1891 Convention stipulated that:

> "...[t]he exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and the British Governments may think fit"[65].

3.62 In conformity with this Article, the two Governments proceeded to demarcate certain parts of the boundary on the ground. A mixed Commission placed beacons on the point where the 4° 10′ N parallel crossed the east coast of Borneo near Broershoek and where it crossed the east and west coasts of the island of Sebatik. These beacons were later replaced by poles of granite[66]. Further clarifications of the line on mainland Borneo were made by a subsequent Agreement of 1915 and by a 1928 Convention between The Netherlands and Great Britain in implementation of Article V of the 1891 Convention.

Section 5. Further Relations Between the Relevant Powers Concerning Their Possessions in and around Borneo from 1891 to 1930

A. Anglo-American Discussions Regarding Certain Islands off the Coast of North Borneo

3.63 As has been seen in the previous Section, a certain division of territorial possessions amongst the interested powers in North Borneo had taken shape by the end of the 19th century. In 1885, Spain had renounced its claims to North Borneo, including to islands lying within three marine leagues of the Borneo coast, in exchange for recognition by Germany and Great Britain of its sovereignty over Sulu[67]. Great Britain and The Netherlands had agreed, with the

---

64 See, paras. 6.63-6.65, below, and the maps reproduced as Maps No. 9, 11, 12, 13, 14, 16, 18, 19 and 20 in the Map Atlas.

65 Annex 75, Vol. 3.

66 Communication by the Netherlands *Chargé d'affaires* dated 19 November 1910, Annex 115, Vol. 3.

67 See, para. 3.34, above.

1891 Convention, to delimit their respective possessions in Borneo by a line following the parallel 4° 10′ N latitude and extending to sea beyond the island of Sebatik[68].

3.64 During the same period, in the northernmost region of Borneo, further agreements were being negotiated and entered into to establish common boundaries, notably between the U.S. colony of the Philippines and British North Borneo.

3.65 Following its defeat in the Spanish-American War, Spain ceded the Philippine Archipelago to the United States through the Treaty of Peace signed in Paris on 10 December 1898. In relevant part, Article III of the Treaty defined the Philippine islands as follows:

"ARTICLE III

> Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line:
> A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes (4° 45′) north latitude, thence along the parallel of four degrees and forty five minutes (4° 45′) north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35′) east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35′) east of Greenwich to the parallel of latitude seven degrees and forty minutes (7° 40′) north, thence along the parallel of latitude seven degrees and forty minutes (7° 40′) north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning"[69].

---

[68] See, paras. 3.58-3.62, above.
[69] Annex 93, Vol. 3.

3.66 Map 7.2 facing page 140 illustrates the extent of the Philippine Islands according to the geographic definition contained in Article III of the 1898 Treaty.

3.67 On 7 November 1900, the United States entered into a further Treaty with Spain for the cession of all remaining Philippine islands lying outside the boundary line set out in Article III of the 1898 Treaty. The relevant portion of the 1900 Treaty contained only one substantive provision, which read as follows:

> "SOLE ARTICLE
>
> Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that Treaty and particularly to the islands of Cagayan Sulú and Sibutú and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines"[70].

3.68 On 22 April 1903, the Sultan of Sulu entered into a "Confirmation of Cession" with the BNBC in which he specified the names of a number of islands - but not including Sipadan or Ligitan - arguably lying more than three marine leagues from the coast which were deemed to be included in the original cession made to Dent and Overbeck in 1878[71]. The relevance of this agreement is discussed in Chapter VII at paras 7.15-7.16.

3.69 The conclusion of this agreement prompted concern in U.S. quarters, since it concerned islands which, by virtue of their being situated beyond three marine leagues from the coast, could potentially have been considered to be U.S. possessions. This led to a visit to the area of a U.S. navy vessel, the *Quiros*, and to subsequent discussions between the United States and Great Britain regarding the extent of their possessions in the area[72].

---

70 Annex 94, Vol. 3.
71 Annex 99, Vol. 3.
72 These matters are discussed further in Chapter VII.

3.70 The matter was ultimately resolved on 2 January 1930 with the conclusion of a convention between the United States and Great Britain setting out the boundary line separating the islands belonging to the United States from those belonging to British North Borneo. A map depicting the boundary line agreed in the 1930 Convention appears as Map 7.3 facing page 147. The Convention was supplemented by an exchange of notes[73]. Pursuant to the supplementary exchange of notes, sovereignty over the islands known as the Turtle islands and Mangsee islands was transferred to the United States, while it was agreed that Great Britain should continue to administer these islands until the United States gave notice to the contrary.

3.71 It should be noted that, on 1 June 1917, the State of North Borneo, which, as it will be recalled was at the time administered by the BNBC, issued a Turtle Preservation Ordinance regarding the control of the collection of turtle eggs within the State or its territorial waters[74]. According to the Ordinance, no person could search or collect such turtle eggs unless he had obtained a licence. Significantly, Section 3 of the Ordinance specifically excluded from this licensing régime areas deemed to be "native reserves", i.e., areas within which the collection of turtle eggs was reserved to natives only. Schedule C attached to the Ordinance listed Pulau Sipadan as one of the "native reserves". As such, the island of Sipadan was not deemed as falling within the territory which was considered to be part of the State of North Borneo for purposes of this Ordinance.

B. Dutch Activities in the Area: The HNLMS *Lynx*

3.72 In the meantime, The Netherlands had also been active in asserting its sovereignty in the area. In 1921, the Dutch vessel HNLMS *Lynx* and an accompanying aircraft went on various trips to patrol the area for pirates off the islands of Ligitan and Sipadan. In particular, the Ship Commander reported that on 26 November 1921, the *Lynx* sent an armed sloop to Sipadan for information about pirate activities and then continued its tour of the area. The

---

[73] Annex 126, Vol. 4; for a more detailed discussion of the Convention, see, paras. 7.52-7.56, below.
[74] Annex 119, Vol. 4.

Commander's report stated, "there were some turtle fishermen on the island [Sipadan]... [who]... had not seen a pirate fleet, and who could not provide any information"[75].

3.73 The *Lynx* continued its search for the pirate fleet up to a distance of three nautical miles from Si Amil, since this island lay north of the 4° 10' N latitude and thus fell under the BNBC's jurisdiction pursuant to the 1891 Convention. The British authorities were promptly warned that a pirate fleet may have been about to approach Si Amil. The Commander's report reproduced the cablegram sent to the Resident of Banjermasin, "English authorities will be warned without delay"[76]. The Dutch Resident replied, "if pirates outside our territory and no threat to the settlements expected, no further measures from Lynx needed"[77].

3.74 The activities of the *Lynx* show that a certain amount of collaboration took place between Dutch and British authorities in policing piracy in the area. No protest was raised by the British Government concerning these activities; indeed, no protest was required, since The Netherlands did not encroach upon the territory of British North Borneo.

Section 6. Events Leading up to and Following the Independence of Indonesia and Malaysia

A. Indonesia

3.75 Prior to 1946, the island of Borneo was divided into five separate political units, one being part of the Netherlands East Indies and the others forming part of the British Empire. The north-eastern part of the island constituted the Protected State of British North Borneo; along the north-west coast of Borneo was the British Protected State of Sarawak, ruled by a rajah of British nationality; along the coast to the north-east of Sarawak were the British Protected State of Brunei and the colony of Labuan. The remainder of the island of Borneo constituted part of the Netherlands East Indies.

---

[75] See, extract from a letter from the Commanding Officer of HNLMS *Lynx* dated 4 January 1922, reproduced in Annex 120, Vol. 4.

[76] *Ibid.*

[77] *Ibid.*

3.76 In early 1942, after the outbreak of war in the Pacific, the Japanese took over the administration of the territory which had formed part of the Netherlands East Indies. The Japanese military occupation ended in August 1945, and Indonesia proclaimed its independence on 15 August 1945. The 1945 and 1949 Constitutions of the Republic of Indonesia did not contain any detailed geographical descriptions of Indonesian territory and opted for a formula which simply referred to the former Dutch colony of the East Indies.

3.77 The federal Constitution of Indonesia issued in 1949 was replaced on 17 August 1950 by an Interim Unitary Constitution which established a unitary State and assigned a primary role to the President of the Republic. Article II of the 1950 Constitution defined the territorial extent of Indonesia as follows: "[t]he Republic of Indonesia comprises the whole territory of Indonesia". Again, no specific geographical description was made in this document.

3.78 On 5 July 1959, the Constituent Assembly was dissolved and the 1945 Constitution restored by Presidential decree. This Constitution is still in force today[78]. No further geographical specifications were added in this document.

B. Malaysia

3.79 The State of North Borneo became a British colony in 1946. Map No. 10 in the Map Atlas illustrates the divisions of the colony of North Borneo as of 1953. Interestingly, the boundary between the districts of Darvel Bay and Tawau does not extend south of the 4° 10′ N latitude.

3.80 Malaya was occupied by the Japanese from 1941 until Japan's defeat in August 1945. In September 1945, the British suggested that all the Malay states and the settlements of Penang and Melaka be joined in a Malayan Union administered by a British Governor. Malay opposition led to the replacement of this British plan with a Federation of Malaya, which maintained the sovereignty of each Malay state. The Federation of Malaya was inaugurated

---

[78] "Indonesia, History of", *Encyclopaedia Britannica Online, 1994-1999.*

on 1 February 1948, but it was not until 1957, after years of unrest, that Britain opted to grant Malaya independence[79].

3.81 The transfer of North Borneo from the United Kingdom to the Federation of Malaysia was effected through the Malaysia Agreement of 9 July 1963. This joined the two British colonies of Sarawak and North Borneo (now Sabah) and the State of Singapore into a federation with Malaya to form the Federation of Malaysia[80]. Article I stated: "the Colonies of North Borneo and Sarawak and the States of Singapore shall be federated with the existing States of the Federation of Malaya as the States of Sabah, Sarawak and Singapore in accordance with the constitutional instruments annexed to this Agreement and the Federation shall thereafter be called 'Malaysia'".

3.82 The 1963 Agreement provided no description of the territory which had been included in the Malaysian Federation as the State of Sabah. The Constitution of the State of Sabah, attached to the Malaysia Agreement, also provided scant detail as to the extent of Sabah's territory. Article I referred to the territory of Sabah as being the territory constituting the region of Sabah prior to Malaysian independence, i.e., before 16 September 1963.

3.83 However, Map No. 12 in the Map Atlas may be of assistance in showing the limits of Sabah's territory at the time of independence. This map was prepared by Sabah's Department of Lands and Surveys in 1964, shortly after independence and printed by the Malaysian Directorate of National Mapping in 1966. Significantly, the map shows the 1891 line extending across the island of Sebatik and out to sea, thus leaving the islands of Ligitan and Sipadan outside the boundary of Sabah and within Indonesian jurisdiction. This map, along with others produced by Malaysia, is discussed in further detail in Chapter VI.

---

79 See, Kaur, A. and Metcalf, I., *The Shaping of Malaysia*, Macmillan Press, 1999, pp. 100-105.

80 *Ibid.*, pp. 99-118. See, also, Tarling, N., *A Concise History of Malaysia*, Frederick A. Praeger Publishers, 1966, pp. 287-295. The State of Brunei chose not to join the federation, while Singapore left it on 19 August 1965.

C. Indonesia-Malaysia 1969 Discussions

3.84 As will be discussed in Chapter VIII, discussions relating to maritime boundaries in the Malacca Strait, the South China Sea, and off the eastern part of Kalimantan were held between the Governments of Indonesia and Malaysia in 1969. These culminated in the signature of a delimitation agreement on 27 October 1969 with respect to the Strait of Malacca and the South China Sea. Unable to reach an agreement off the coast of Kalimantan, the Parties decided to implement a *status quo* agreement with respect to the status of the disputed islands.

CHAPTER IV

THE PRE-1891 SITUATION

Section 1. Introduction

4.1 The present States of Indonesia and Malaysia, as well as important parts of the Philippines, are the distant successors of Moslem Sultans established in the region by the 14th century. Therefore, when the Europeans arrived and began to colonise both the Malay peninsula and the Indonesian and Philippine islands - the Portuguese first (during the first half of the 16th century), rapidly followed by the Dutch and the Spaniards, then by the British - these territories could, by no means, be defined as *terrae nullius*. As the International Court of Justice puts it:

> "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*"[1].

As elsewhere in Asia (as well as in Africa or America):

> "in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers"[2].

This is precisely what happened in the relevant region.

---

1 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 39, para. 80. Here, the Court was speaking of the period when Western Sahara was colonised by Spain, i.e., the second part of the 19th century; however, this can be transposed to this more remote period, at least concerning this part of Asia.

2 *Ibid.*

4.2 As has been explained in Chapter III, Great Britain's title over North Borneo derived partly from the Sultan of Brunei and partly from the Sultan of Sulu[3]. The purpose of the present chapter is to show that, for its part, The Netherlands acquired its part of the island of Borneo, now Kalimantan, from local rulers, in particular from the Sultan of Boeloengan (Section 3). In order to make this clearer, Indonesia will first describe the concept of territory as it was perceived by local rulers before the arrival of the European powers in the region (Section 2).

Section 2. The Legal Notion of Territory as Historically Perceived by Local Rulers and Its Consequences as to the Cessions of Territories

4.3 In the present Section, Indonesia undertakes to describe the local Sultans' perception of their legal links to territory. Given the scarcity of documents from the pre-colonial period or even from the colonial period itself expressly referring to Pulau Ligitan and Pulau Sipadan, one can only be guided by inference when addressing the question of whether, given the nature of the two islands, the local rulers who controlled the neighbouring territories, considered these islands as appertaining to them.

4.4 In discussing the notion of ownership, the general notion of territorial title according to the local rulers will be taken into account - a notion which differs considerably from that existing in contemporary international law - in a way similar to that followed by the Tribunal in the first stage of the *Eritrea/Yemen* Arbitration[4].

4.5 In the light of this *caveat*, Indonesia will briefly examine the nature of the ties which united the Sultans of the region to their territorial possessions. In particular, this Chapter will consider the ties between the Sultan of Sulu, given that Malaysia claims to be its distant successor, and the Sultan of Boeloengan, whose territory was incorporated into The

---

3 See, paras. 3.26-3.28, above.

4 *Eritrea/Yemen* Arbitration, Award of the Arbitral Tribunal in the First Stage of the Proceedings, 9 October 1998, p. 34, para. 120. See, also, p. 37, paras. 130-131; p. 40, para. 143, and pp. 139-140, para. 525.

Netherlands' possessions before becoming part of Indonesia, and their respective territories. It will then illustrate the consequences of this common perception of territorial authority in relation to cessions made to colonial powers.

A. The Legal Notion of Territory in the Region before the Colonial Period

4.6 As far as the Government of Indonesia is aware, there exists no contemporary document of local origins describing in a systematic way the legal ties that existed between the Sultans who had authority in the region, and in particular over certain parts of the island of Borneo, and their territories. It is therefore necessary to base a review of the situation on the later analyses of historians or anthropologists specialised in this part of the world.

4.7 According to the Western notion of Statehood, which has progressively taken hold since the end of the Middle Ages and which has become an essential principle in contemporary public international law, territory constitutes a "constituent element" of Statehood. Consequently, within the boundaries which demarcate a State, the State enjoys full and exclusive territorial authority; respect for this territorial sovereignty has become an essential foundation of international relations[5].

4.8 However generalised this notion of Statehood has become in modern times, the notion of a State's ties with its territory is not inherent in all political organisations. In Europe, this concept only established itself progressively with the advent of the modern State, as it is understood today, and it was not generally adopted elsewhere until much later. As the Court noted in the *Western Sahara* case, "legal ties are normally established in relation to people"[6]. In non-European societies, inter-personal ties were often stronger than the relationship between rulers and their territory. This has been recently acknowledged by the Award of 9 October 1998 of the Arbitral Tribunal constituted between Eritrea and Yemen, according to which "classical Islamic law concepts ... practically ignored the principle of 'territorial

---

5 *Island of Palmas* case, P.C.A. Award of 4 April 1928, *UNRIAA*, Vol. II, p. 839. See, also, *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 4, at p. 35.

6 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 41, para. 85.

sovereignty' as it developed among the European powers and became a basic feature of 19th century western international law"[7].

4.9 Thus was the situation in the Indonesian, Philippine and Malaysian areas under review prior to the arrival of the European powers . The political organisation might have differed in detail, but the relationship between political power and territory was essentially the same, the Islamic concept of power having never completely ousted local traditions. As one commentator has stated, "[a] great deal of pre-Islamic institutions persisted alongside with Islamic ones, and it was precisely these pre-Islamic elements that prevented or obstructed the full implementation of those prerogatives and powers normally associated with the sultanate in the more orthodox centres of Islam"[8].

4.10 Political power was wielded by the Sultans (or Rajahs), and was characterised not by "sovereignty" in the usual sense of the word according to contemporary international law, but by the concept of *negeri*, from the sanskrit *negara*, which includes but surpasses the notion of city and designates the special relationship between the Sultan and his kingdom[9]. The *negeri* is characterised by the *effective presence* of the Sultan.

4.11 In every case, there was an important religious element included in the notion of power. The Sultan was characterised by his *daulat*, the "white blood" which ran through his veins, and acted as intermediary between men and god or various divinities (the Sultan of Sulu proclaimed himself to be a descendent of the Prophet Mohamed, the Sultans of Melaka and Johore claimed to be descended from the mythical founding father of Palembang, Sri Tri Buana).

---

7 *Eritrea/Yemen* Arbitration, Award of the Arbitral Tribunal in the First Stage of the Proceedings, 9 October 1998, p. 37, para. 130.

8 Cesar, A.M., "Political and Historical Notes on the Old Sulu Sultanate", *Journal of the Malaysian Branch of the Royal Asiatic Society, Volume XXXVIII*, Singapore, 1965, p. 27 ; see, also, Tarling N., *Sulu and Sabah – A Study of British Policy Towards the Philippines and North Borneo from the Late Eighteenth Century*, O.U.P., Kuala Lumpur, 1978, p. 2.

9 See, Gonda, J., *Sanskrit in Indonesia*, International Academy of Indian Culture, Nagpur, 1952, p. 629.

4.12 In every case, the territorial system was characterised by a "local group identification based not upon boundaries but rather upon the vague space which surrounds a center point", where the Sultan resides, and described by Dr. Thomas Kiefer as the distinctive trait of a "segmentary State"[10]. As emphasised by Prof. Clifford Sather, in his analysis of this "shading off of jurisdictional control" in the context of relations between Sulu and the nomadic sea tribe of the Bajau Laut, "[a]uthority was strong only at the center and diminished rapidly as one moved outward"[11]. "Strictly speaking, the sultanate of Sulu was a multi-ethnic group state which did not have any recognised boundaries"[12].

4.13 *Mutatis mutandis*, this holds true for all other kingdoms in the region and, as recognised by Dr. N. Tarling, "[i]n North Borneo, a somewhat similar situation apparently prevailed, modified by the peculiar features of the territory and of its demographic pattern"[13]. In Brunei, the rivers represented the only means of penetration and control and "the Bruneis viewed their Bornean dominions as a collection of rivers and peoples, the two frequently [but not always] coinciding"[14].

4.14 According to a pre-eminent scholar in traditional social and political structures of the Sultanate of Brunei: "[b]efore the European partitioning of 19th century Brunei its precise boundaries, especially in the interior, were unknown. Indeed, it is most unlikely that the Bruneis possessed much knowledge of or worried much about their interior boundaries... What mattered to the Bruneis was the control of rivers and the people living near them. Where the rivers ended, and where the people faded off in the (to the Bruneis) forbidding jungle interior, there any direct Brunei control ended... In sum, no sharp geographical boundaries of Brunei control can be drawn for the interior. In the absence of adequate data it

---

10 See, Kiefer, T.M., "The Sultanate of Sulu: Problems in the Analysis of a Segmentary State", *Borneo Research Bulletin*, Vol. 3, No. 2, December 1971, p. 47.

11 See, Sather, C., "Sulu's Political Jurisdiction over the Bajau Laut", *ibid.*, pp. 58-59.

12 Kiefer, quoted in Tarling, *op. cit.*, at fn. 8, p. 5; this approach is also endorsed by Sather, C., *The Bajau Laut : Adaptation, History and Fate in a Maritime Fishing Society of South-Eastern Sabah*, OUP, Kuala Lumpur, 1997, p. 38.

13 Tarling, *op. cit.*, at fn. 8, p. 5.

14 Brown, D.E., "The Social Structure of Nineteenth Century Brunei", *The Brunei Museum Journal*, Vol. 1, No. 1, Brunei, 1969, p. 172 ; see, also, Tarling, *op. cit.*, at fn. 8, p. 4, who describes the Sultanate of Brunei, by the late 18th century, as "a congeries of rivers".

can only be surmised that Brunei control diminished as a function of distance from the waterways controlled by Brunei"[15]. "[T]he state, as Kiefer has pointed out, was defined by reference to its center, not its geographical boundaries"[16].

4.15 In such a system, which has been described as "feudal" in nature, the (personal) ties of allegiance were greatly significant and eclipsed notions of territorial possessions[17]. The "grants of territory" by the Sultan were of a personal nature and their beneficiaries enjoyed a measure of freedom which increased the further the distance was from the centre[18]. As N. Tarling notes in connection with the prevailing situation in North Borneo, "to talk of acquisition and of territorial control is perhaps to Europeanise what occurred"[19].

4.16 It was even sometimes the case that territory was claimed by two sultanates or by none at all. This is the situation described by D.E. Brown with regard to the north of Borneo at the end of the 19th century: "The Sultanate of Sulu, one time vassal of Brunei ... claimed almost the whole of what was to become the modern state of Sabah. So did Brunei. To simplify a complex state of affairs, Sulu was more or less in control from the tip of northern Borneo to the east. Brunei was more or less in control to the west of the tip. In some places local authorities recognizing an overlordship of either Sulu or Brunei interdigitated. Some local authorities perhaps recognized both overlords as the situation demanded from time to time, or perhaps asserted their own autonomy and recognized neither overlord"[20]. N. Tarling makes the same point: "the acquisition of the Borneo territories had given Sulu something Brunei still regarded substantially as its own"[21].

---

15 Brown D.E., *Brunei : The Structure and History of a Bornean Malay Sultanate*, Star Press, Brunei, 1970, pp. 76-77.

16 Sather, *op. cit.*, at fn. 11, p. 58; see, also, Ricklefs, M.C., *A History of Modern Indonesia : c.1300 to the Present*, Basingstoke, Macmillan, 1981, pp. 14, *et seq.*

17 See, Chaik Boon Khang, "Feudalism in Pre-Colonial Malaya: The Past as a Colonial Discourse", *33 JSEAS 1994*, p. 2. See, also, e.g., Andaya, B.W. and L.Y., *A History of Malaysia*, Macmillan, London, 1982, pp. 44, *et seq.*

18 See, Zainal Abidin bin Abdul Wahid, "Power and Authority in the Melaka Sultanate – The Traditional View" in Sandhu, K.S., and Wheatley P., (eds.) *Melaka – The Transformation of a Malay Capital, 1400-1980*, ISEAS/OUP, 1983, p. 106.

19 Tarling, *op. cit.*, at fn. 8, p. 4.

20 Brown, *op. cit.*, at fn. 15, pp. 76-77 (footnotes omitted).

21 Tarling, *op. cit.*, at fn. 8, p. 4.

4.17 This situation recalls the description given by the Court regarding the legal ties that existed between Western Sahara and the Kingdom of Morocco at the time of Spanish colonisation:

> "Not infrequently one tribe had ties with another, either of dependence or of alliance, which were essentially tribal *rather than territorial*, ties of allegiance or vassalage".
>
> "That the Sharifian State at the time of the Spanish colonization of Western Sahara was a State of a special character is certain. Its special character consisted in the fact that it was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan, through their caids or sheikhs, rather than on the notion of territory"[32].

Following from this, the Court noted:

> "In consequence, the legal régime of Western Sahara, including its legal relations with neighbouring territories, cannot properly be appreciated without reference to these special characteristics"[33].

4.18 The same is true of the present situation where it is impossible simply to transpose the concept of territory according to modern international law, be that with regard to rules used to define boundaries - which were very unclear between the sultanates of the region - or to the acquisition and cession of territorial possessions. This is particularly true regarding uninhabited islands. As the *Eritrea/Yemen Arbitration* stated in a different but comparable context:

> "there is the problem of the sheer anachronism of attempting to attribute to such a ... society the modern Western concept of a sovereignty title, particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen"[34]

---

32 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 42, para. 80 and p. 44, para. 95. (Emphasis added). See, also, pp. 57 and 64 regarding the legal ties existing between Western Sahara and the "Mauritanian entity".

33 *Ibid.*, at p. 41, para. 87.

34 See, *Eritrea/Yemen* Arbitration, Award of the Arbitral Tribunal in the First Stage of the Proceedings, 9 October 1998, p. 118, para. 446.

4.19 This must also be kept in mind when analysing the territorial cessions made by local rulers to colonial powers.

B. The Uncertain Extent of the Cessions by the Local Rulers to the Colonial Powers

4.20 The situation in existence at the time of colonisation can be summarised as follows:

- The local Sultans held power over territory that was not clearly delimited;

- Their authority was all the more uncertain the further the distance was from the centre where they were established;

- Their authority expressed itself through territorial administrators, linked to the Sultan through ties of personal allegiance;

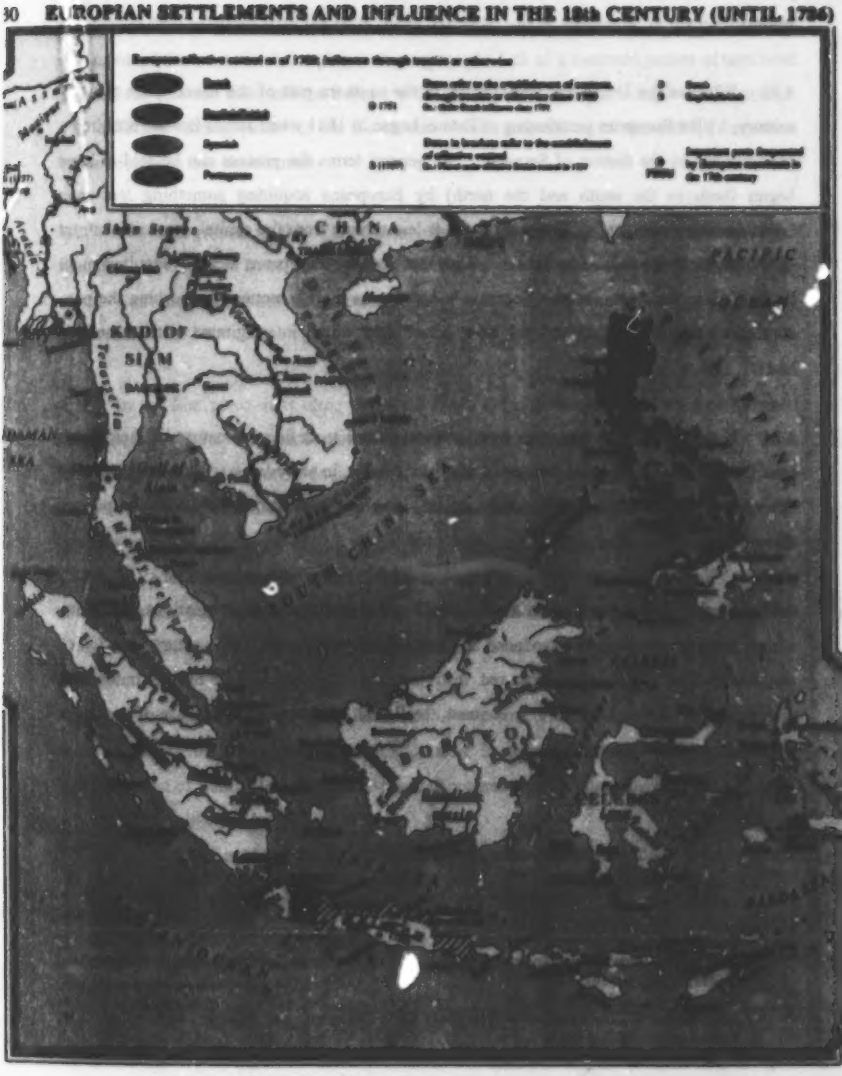
- It was not unusual for these ties to overlap and for the same territory to be claimed by various local rulers, who could probably contemporaneously invoke an equally justifiable title over the same land.

4.21 Not only are these characteristics reflected in the methods of acquisition and cession of territory between the local Sultans before colonisation[25], they also explain the peculiarities of the cessions granted by the Sultans to the colonial powers in the region, Spain, The Netherlands or Great Britain, as well as the difficulties that these powers encountered when they decided to define the boundaries of their respective possessions.

4.22 Such was the case, in particular, during the colonial division of Borneo. A study of documents contemporary to the period of colonisation by The Netherlands and Great Britain, and, notably, a study of the treaties entered into by these powers and the local rulers,

---

[25] See, para. 4.16, above.



Map 4.1

demonstrates the uncertainty over the exact scope of the cessions granted to the colonial powers. Map No. 4.1 shows the state of European settlements in North Borneo in the 18th century[26].

4.23 Whereas the Dutch had been settled in the southern part of the island since the 18th century, " [t]he European partitioning of Brunei began in 1841 when James Brooke acquired a governorship in the district of Sarawak ... In general terms the process can be said to have begun (both in the south and the north) by Europeans acquiring something less than 'sovereign' rights to districts that were more or less remote from the capital, were recalcitrant and were poorly controlled by Brunei. With that start the Europeans steadily acquired more districts ... In the North Borneo Company's case it was more a matter of absorbing the non-contiguous districts which had not been leased and which interdigitated with those that had "[27].

4.24 Nevertheless, the European powers were careful to define the nature of their rights over the territories ceded and the exact limits of the same, in accordance with the principles of "European public law", which were applied *inter se* in relations between the powers themselves.

4.25 To this end, they relied on the favoured legal instrument of these relations, the treaty, which the Portuguese had introduced to South-East Asia in the 16th century and which constituted The Netherlands' favoured instrument in their acquisition of the Indonesian archipelago, including Borneo[28]. In contrast, the British only began to make use of treaties at the end of the 18th century.

---

26 This map is contained in Pluvier, J.M., (ed.), *Historical Atlas of South-East Asia*, Brill Publishers, Leiden, 1995 (Map 30).

27 Brown, *op. cit.*, at fn. 15, p. 77.

28 See, Andaya, L., *The Kingdom of Johor 1641-1728 – Economic and Political Developments*, OUP, Kuala Lumpur, 1975, p. 56.

4.26 At the same time, the Europeans transposed to this part of the world their own concepts of territorial possessions. During this process, they encountered grave difficulties, not only in their relations with the local rulers, but also, and by extension, in the definition of the extent of the territories belonging to them given the lack of a common notion of territorial possessions between them and the Sultans in the region from whom their legal title originated. The differing starting points of the Dutch and British negotiators of the 1891 Convention bears witness to this impediment.

4.27 The background to this Convention, which is of crucial importance in the current dispute, is discussed in detail in Chapter V. Suffice to note, at this point, that the background to the Convention confirms the uncertain extent of pre-colonial territorial titles described above.

4.28 In the first place, it is clear that the Sultans did not always intend to abdicate their "sovereignty" (if the word can be used in such a context) in favour of the colonialists. Thus, the British manuscript notes made in preparation for the Draft Agreement for the Anglo-Dutch Joint Commission established in order to resolve the boundary question emphasise "that the territory ceded to Mr. Dent by the Sultans of Brunei and Sulu was to be governed by the Company under the Suzerainty of the Sultans to whom an annual sum was secured"[29], thereby confirming that this "cession" only transferred a right to administer and did not imply, at least at the time, full territorial sovereignty by the Dent and Overbeck company.

4.29 These notes also attest to the existence of two concurrent pre-colonial titles over the territory "ceded" to the company, since this "cession" is attributed to both the Sultan of Brunei and the Sultan of Sulu. The same manuscript notes come back to this point later on:

> " Not only did the Sultan of Sulu, before the grants were made, claim the territory as belonging to him 'as far South as the Sibuco River', but the Sultan of Brunei claimed this territory also, and the British

[29] Annex 56, Vol. 2, at p. 117.

> North Borneo Company now pay annually $ 5000 to the former Sultan, and $ 2000 to the latter for the territory then ceded..."[30].

4.30 Indeed, it is on the basis of these concurrent claims of the Sultans of Brunei and Sulu that one of the Dutch negotiators in the Joint Commission, Mr. Gysberts, contested Britain's territorial claim:

> "...and he added as a proof of how little reliance could be placed on the claims of native Chiefs, that the Sibuco had been ceded to the North Borneo Company by the Sultans both of Brunei and Sulu, as evidenced by the Concessions "[31].

4.31 This is not an isolated incident, as is clear from the letter of 22 May 1849 from Mr. A. von Dewall, the Dutch Civil Commander of Koetei on the east coast of Borneo, to the Dutch Resident of the south and east coast of Borneo. Mr. Von Dewall, in recounting his conversations with the Sultans of Berou and Boeloengan, states:

> "Both parties declare therein to be the legal Sovereigns of Tidoeng. Boeloengan denies also ever to have been dependent of Berou, which, on the contrary, the latter assure to have been the case";

although he concludes philosophically:

> " It was indifferent to me in the present case who of the two was right, as my only object was to prove beyond the possibility of contradiction, by an authentic document, that Tidoeng is a Netherland possession"[32].

4.32 Given these comments, it is perhaps not an exaggeration to conclude with the assertion of one of the British drafters of the manuscript notes, referred to at para 4.28, above, who stated:

---

30 Annex 56, Vol. 2, pp. 125-126.

31 Proceedings of the Joint Commission appointed by the British and Netherlands Governments for considering the Question of the Boundary between the Netherlands Indian Possessions on the Island of Borneo and the Territory belonging to the British North Borneo Company, Second Meeting, 19 July 1889, p. 6, Annex 58, Vol. 3.

32 This letter is integrally quoted in the Proceedings of the First Meeting of the Joint Commission, 16 July 1889, p. 9, Annex 57, Vol. 3.

"Native rulers really know nothing of Boundary Lines"[33]

and:

> "The Sultan [of Sulu] himself defined his territory as extending to the River Sibuco, and this seems to establish his claim at least as clearly as any similar statement that may have been made by the Boeloengan Sultan"[34].

4.33 This ignorance, which may seem strange from a European State's perspective where the territorial foundations of a State are clearly established, is not so in reality in the context of the perception that these native rulers had about their territory at that time. At any rate, the local rulers did not care as much as the Europeans about the precise external limits of their possessions. As Sir J. Brooke noted as early as 1849 (as a matter of fact, in order to oppose the Dutch presence in Borneo):

> "The geography of Borneo is so imperfect, and the boundary-lines of petty States so irregular, so vague, and of so little consequence to the native Rulers..."[35].

4.34 Years later, the author of the British manuscript notes relies on this opinion when he writes:

> "No Boundary Agreement has ever been entered into between the Sultans of Sulu, Brunei or Boelongan, and Sir J. Brooke pointed out on the 3rd October 1849 that the Sovereignty of Borneo was imperfect, the Boundary lines of petty states irregular and vague and of little consequence to the native Rulers"[36].

---

33 Annex 56, Vol. 2, at p. 118.

34 *Ibid.*, at p. 130.

35 *Memorandum on the Dutch Frontier on the North-east Coast of Borneo*, by Sir E. Hertslet, dated 20 June 1882, p. 2, Annex 28, Vol. 2.

36 Annex 56, Vol. 2, at p. 122.

4.35 Thus, one can hardly disagree with the statement contained in the 1879 Foreign Office confidential *Memorandum on the Political, Strategical, and Commercial Advantages to Great Britain of the Northern Part of Borneo; as well as on the Right of Holland, under the Treaty of 1824, to oppose the Occupation of any portion that Territory by Great Britain*, according to which:

> "The territories in Borneo in the actual occupation of the *Dutch*, the Sultan of *Brunei*, and the Sultan of *Sulu*, are not clearly defined"[37].

4.36 As was noted in the *Memorandum respecting Cessions to Messrs. Dent and Overbeck by Sultans of Brunei and Sulu of Territories on the North-East Coast of Borneo, and position of Her Majesty's Government in regard to such Cessions*, of 6 October 1879:

> "The question of the Sulu territory in Borneo is a very complicated one. The limits of the territory are very uncertain, and the exact nature of the authority exercised over it by the Sultan of Sulu is equally so"[38].

4.37 This is also confirmed by the deliberations for the grant of the North Borneo Royal Charter, which revealed that the boundaries of the territory which should be included in this Charter as being under the dominion of the Chartered company were not clearly defined, particularly with regard to the Dutch claims on the south-east coast[39].

4.38 In these circumstances, the cessions granted by the local Sultans can no doubt offer historical and even legal justification for the presence of colonial powers on the island of Borneo. But this territorial title was not sufficient to determine, with the necessary precision, the boundary delimitations. Given the special characteristics of the Sultanates in the region,

---

37 Annex 21, Vol. 2, at p. 35.
38 Annex 20, Vol. 2, at p. 291.
39 *Notes on the North Borneo Charter* by Sir J. Pauncefote dated January 1882, p. 21, Annex 24, Vol. 2.

the ties between the Sultans and their territory and the indeterminate spatial limits of their authority, the end result was contrary to the *plerumque fit*, a situation where there was a disassociation between territorial title and boundary title[40].

4.39 *A fortiori*, the comments made above are also valid with regard to the islands lying in proximity of the mainland. Indeed, given the personal and non-territorial nature of the local Sultans' authority, the Sultans did not pay particular attention to uninhabited islands, and the first treaties of cession entered into between local rulers and European powers attest to some indifference on the part of the Sultans and their negotiating partners towards islands situated alongside the mainland territory that had been ceded[41]. Thus, Article II of the Treaty of 2 August 1824 between the Sultan and Tumungong of Johore, on the one hand, and the English East India Company, on the other, states in rather vague terms:

> "Their Highnesses ... hereby cede in full sovereignty and property to the Honourable the English East India Company, their heirs and successors for ever, the Island of Singapore, ... *together with the adjacent seas, straits, and islets*..."[42].

4.40 However, some treaties were more precise in that certain islands were mentioned, or a certain maritime area was referred to, including islands within it. Thus, by the 1769 Grant to the English East India Company, the Sultan of Sulu ceded :

> "...all [his] right and title to the north part of Borneo from Kimanis on the west side, in a direct line to Townson Abai on the east side, thereof, with all the lands, places, and people, &c., within those limits, and also all the islands to the northward of the said island of Borneo, as Balambangan, Palawan, Banguey, Balabac, Monnach, and all other islands adjoining, as well on the north as east and west sides of those parts of my dominions"[43].

---

40 See, *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554.

41 There were some exceptions, such as the cession of the island of Labuan to the Great Britain. However, this uninhabited island was much bigger than Ligitan or Sipadan, and was situated at a strategic place. See, Leong, C., *Sabah. The First 100 Years*, Percetakan Nan Yang Muda Sdn. Bhd., 1982, p. 24.

42 Annex 6, Vol. 2 (emphasis added). See, also, e.g., the Grant from the Sultan of Sulu to the English Company in 1764, p. 210, Annex 2, Vol. 2.

43 Annex 2, Vol. 2.

4.41 The same can be said for the Article X of the Treaty of Friendship and Commerce of 27 May 1847, between Great Britain and Borneo, which indicates that the Sultan of Borneo ceded:

> "...the Island of Labuan, situated on the north-west coast of Borneo, together with the adjacent islets of Kuruman, Little Rusakan, Great Rusakan, Da-at, and Malankasan, and all the straits, islets, and seas situated half-way between the fore-mentioned islets and the mainland of Borneo"[44].

4.42 The Dent and Overbeck concession of 1877 indicates more precisely that the Sultan of Brunei granted:

> "...all the territories belonging to [him] from the Sulaman River on the north-west coast of Borneo unto the River Pietan on the north-east coast of the island, containing twenty-one States, together with the Island of Banguey and all the other islands within three marine leagues of the coast, for their own exclusive uses and purposes"[45].

4.43 In any event, Ligitan and Sipadan were both at a greater distance than three marine leagues (or nine nautical miles) from the coast of Borneo.

4.44 This lack of precision in determining territorial possessions in the area was the source of confusion among the colonial powers themselves. Thus, on several occasions, the U.S. Department of State declared its uncertainty regarding the ownership of certain islands in the region:

> "this Department is not possessed of any information tending to show whether the islands referred to are within the cession to the United States"[46];

> "that Department [the U.S. War Department] possesses no information tending to show whether the islands of Banguey, Balambanga and

---

[44] Annex 11, Vol. 2, at p. 217.

[45] Despatch from Acting Consul-General Treacher to the Earl of Derby, with inclosure, dated 2 January 1878, p. 102, Annex 16, Vol. 2.

[46] Letter from U.S. Acting Secretary of War to U.S. Secretary of State dated 15 October 1901, Annex 95, Vol. 3.

Mallawalli are included in the territory ceded to this Government by Spain"[47].

4.45 These uncertainties explain why the European powers had to conclude treaties delimitating boundaries between themselves. During the negotiations leading to these treaties, the European powers sought to gain advantage from the local cessions they had been granted. But, unable to find in the relevant pre-colonial rules any sufficiently clear directives to determine the boundaries of their possessions, the European powers generally fixed these boundaries on the basis of a mutually acceptable compromise in keeping with their own notion of territorial sovereignty. This is precisely what The Netherlands and Great Britain did when they concluded the 1891 Convention[48].

Section 3. Colonial Acquisition by The Netherlands

4.46 The acquisition of large parts of the island of Borneo by The Netherlands followed the usual scheme of European colonisation of territories in South-East Asia: agreements were concluded with local rulers (Sub-Section A), and this equally applied to the part of the north-eastern area of the large island which was ceded to the Dutch by the Sultan of Boeloengan (Sub-Section B).

A. Relations between The Netherlands and Local Rulers

4.47 Until 1795, in South-East Asia the Netherlands East India Company *(Verenigde Oost-Indische Compagnie)* (the "Company") exercised public rights under a Charter granted in 1602 to it by the Netherlands United Provinces. Article 35 of the Charter authorised the Company "to conclude conventions with Princes and Powers" in the name of the States-General of The Netherlands[49]. At first, these conventions mainly involved trade issues, such

---

47 Letter from U.S. Secretary of State to U.S. Secretary of the Navy dated 21 October 1901, Annex 96, Vol. 3.

48 See, Chapter V, below.

49 See, "The Status of the East-India Company Conventions with Native States", Annex I to the Counter-Memorandum submitted on 23 April 1926 by The Netherlands in the *Island of Palmas* case, Permanent Court of Arbitration, p. 49, Annex 122, Vol. 4. On the history of the Netherlands East India Company, see, Drooglever, P.J., "The Netherlands Colonial Empire: Historical Outline and Some Legal Aspects", in *International Law in the Netherlands*, Vol. I, 1978, pp. 104-129, 139-142.

as the establishment of trade monopolies or the creation of alliances between the Company and local rulers. Later, they increasingly served the purposes of providing recognition of the settlements established by the Company, of accepting the suzerainty of the Company or of the cession of all or part of their territories to the Company by the local rulers. These conventions constituted agreements between subjects of international law. As noted by the Court:

> "...such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*"[50].

4.48 Once the suzerainty of the Company had been recognised, further conventions or "Contracts" were often concluded specifying the degree of autonomy provided to the local rulers whose territories now could be regarded as "protected States" or as fiefs of the Company[51].

4.49 The policy of the Netherlands East India Company as far as the acquisition of territory is concerned was to conclude treaties of cession[52]. In exceptional cases, when there seemed to be no alternative, particular areas were conquered and subsequently annexed.

4.50 In 1795, the Republic of the Netherlands United Provinces became the Batavian Republic. Under Article 247 of the Constitution of the Batavian Republic, this Republic succeeded to all the possessions of the East India Company, which was terminated in 1799. In 1806, the Batavian Republic became the Kingdom of Holland. After an interval of annexation by France (1810), the Kingdom of The Netherlands was created in 1813.

4.51 During the French annexation of Holland, the Dutch possessions in the East Indies had been occupied by the British. After the Napoleonic war, it was decided that these possessions would be returned to The Netherlands[53]. Specific arrangements for this purpose were made in

---

50 *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, p. 12, at p. 39, para. 80.

51 See, Annex I "The Status of the East-India Company Conventions with Native States" to the Counter-Memorandum submitted by the Netherlands in the *Island of Palmas* case, Permanent Court of Arbitration, Annex 122, Vol. 4.

52 See, para. 4.25, above.

53 *Definitive Treaty of Peace and Amity between His Britannic Majesty and His Most Christian Majesty* dated 30 May 1814, British and Foreign State Papers, Vol. 1, Part I (1812-1814), pp. 151-170.

the Treaty concluded in London between Great Britain and The Netherlands on 13 August 1814[54]. The interpretation of this Treaty led to a number of disputes which could not be resolved by two subsequent arrangements. Therefore, a new treaty was concluded in London on 17 March 1824[55].

4.52 After the return of the Dutch possessions in the East Indies, the Government of the Netherlands East Indies continued the practice of the East India Company. Some parts of the East Indies were still considered to be independent States. The conventions concluded with them, usually for the purpose of establishing the suzerainty of The Netherlands, were subject to the formal requirements for the conclusion of treaties under the Netherlands Constitution. The last of these conventions was concluded in the second part of the 19th century.

4.53 The agreements with the local rulers which were already under the suzerainty of The Netherlands were referred to as "Political Contracts" (or "Contracts of Vassalage") and could be concluded by the Governor-General under the provisions of the Government Regulations for the Netherlands Indies. They were often renewed with certain changes, usually concerning the scope of the autonomy of the local ruler. Also, each time a new ruler succeeded to office, an act of confirmation (*"Akte van bevestiging"*) by the Netherlands Indies Government was required for which purpose the new ruler signed an act of allegiance (*"Akte van verband"*). These Contracts and acts were communicated to the Netherlands Parliament[56].

4.54 All these territories were ruled by the local rulers with varying degrees of autonomy. By the end of the 19th century, approximately half of the territory of the Netherlands East Indies constituted "self-governing territories". There were over 300 such territories. The rest of the country was under direct rule[57].

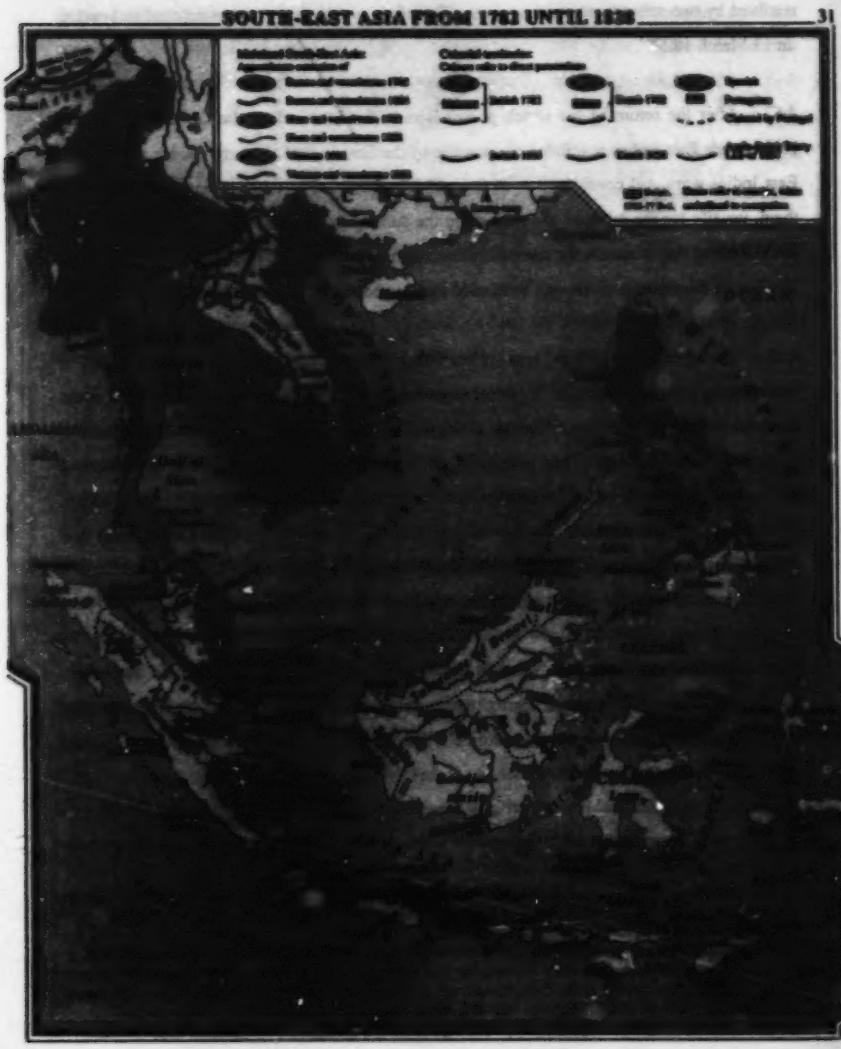
---

54 *Convention between Great Britain and the Netherlands relative to the Dutch Colonies, Trade with the East and West Indies*, etc., dated 13 August 1814, British and Foreign State Papers, Vol. 2 (1814-1815), pp. 370-378.

55 *Treaty between Great Britain and The Netherlands*, signed at London, 17 March 1824, Annex 5, Vol. 2.

56 On these Contracts, see entry *"Contracten met zelfbesturende landschappen"* ("Contracts with self-governing countries") in the *Encyclopedie van Nederlandsch Indië* ("Encyclopedia of the Netherlands Indies"), 2nd ed., Vol. I (1917), pp. 525-530.

57 See, entry *"Zelfbestuur (Inlandsche)"* ("Self-government/native"), *ibid*, Vol. IV (1931), pp. 826-831.



Map 4.2

B. The Acquisition of the Territory of Boeloengan by The Netherlands and Its Geographical Extent

4.55 When the Netherlands East India Company established its first contacts with Borneo during the 17th and 18th centuries, the Sultan of Banjermasin (on the south coast of Borneo) considered himself as having supreme authority over large parts of southern and eastern Borneo. To the north, his territory bordered on that of the Sultans of Brunei and of Sulu. On the east coast, the territory under the supremacy of Banjermasin included the "realm" of Berou, consisting of three "States": Sambalioeng, Goenoengtaboer and Boeloengan. The last-mentioned state constituted the northeasternmost part of the areas subject to the Sultan of Banjermasin[58]. Map 4.2 illustrates the territorial divisions in the area during the 1782-1828 period[59].

4.56 The first treaties ("Contracts") with the Sultan of Banjermasin were concluded by the Company in 1635, 1733, 1747 and 1756. In 1787 the Sultan of Banjermasin ceded the territory of the three states constituting Berou to the Company[60]. However, in 1797 the Company ceded the territories back to the Sultan.

---

[58] There exists little literature on the history of Boeloengan. This part of the Memorial is based on the following materials (all in Dutch):
- Eisenberger, Dr. J., *Kroniek der Zuider- en Oosterafdeling van Borneo* ("Chronicle of the Southern and Eastern Division of Borneo"), Banjermasin, 1936.
- "Boeloengan", *Encyclopaedie van Nederlandsch Indië*, Vol. VII, 1935, pp. 94-97.
- Gallois, J.G.A., "*Korte aanteekeningen, gehouden gedurende eene reis langs de oostkust van Borneo*" ("Short Notes kept during a journey along the eastern coast of Borneo"), *Bijdragen Koninklijk Instituut*, Vol. IV (1856), pp. 221-263.
- van Nieuwkuijk, J., "*Exploitatie door Nederlanders van de Noord-Oostkust van Borneo*" ("Exploitation by Dutchmen of the Northeast coast of Borneo"), *Tijdschrift voor Nederlandsch Indië* 1882 (II), pp. 121-142, 161-180 and 401-434.
- In 't Veld, S.G., "*Aanteekeningen omtrent het rijk van Borneo*" ("Notes on the realm of Borneo"), *De Indische Gids*, Vol. 6 (1883), pp. 21-27.

[59] This map is contained in Flavier, J.M., (ed.), *Historical Atlas of South-East Asia*, Brill Publishers, Leiden, 1995 (Map 31). See, also, map entitled "Colonial South-East Asia: Administrative Divisions c.1930", in the same Atlas, (Maps 48 and 49).

[60] Dutch text in Stapel, F.W., (ed.), *Corpus Diplomaticum Neerlando-Indicum*, Volume VI (1753-1799), The Hague 1955, pp. 596-614.

4.57 After the British occupation of the Netherlands Indies, a new Contract superseding all previous ones was concluded with the Sultan of Banjermasin on 3 January 1817[61]. Article 5 of this Contract confirmed the cession to The Netherlands of, *inter alia*, "Barrau" (Berou) and all its dependencies. On 13 September 1823, a supplementary Contract was concluded amending Article 5 of the contract of 1817[62]. The reference to Berou ("Barouw") and dependencies remained.

4.58 On 4 May 1826, a new Contract was concluded to replace all previous Contracts[63]. Article 4 confirmed the cession to The Netherlands of Berou ("Barouw") and dependencies.

4.59 It appears that sometime during the early years of the 19th century, Boeloengan had separated from Berou[64]. In a Contract of 27 September 1834, the Netherlands Indies Government transferred the territory of Berou to the Sultan of Goenoengtaboer in fief. Boeloengan is not included in the Contract. On the same occasion, on 27 September 1834, the Sultan of Boeloengan for the first time submitted himself directly to the authority of the Netherlands Indies Government[65]. This indicates that he had, by then, no hierarchical relationship with the Sultan of Goenoengtaboer and that his territory was, at the time, regarded as completely separate from Berou.

4.60 Also during this period the territory of Tidoeng (the *"Tidoengsche landen"*), consisting of six districts located to the north of Boeloengan proper, became subject to the Sultan of Boeloengan[66]. That area was henceforth regarded by the Dutch as a dependency of Boeloengan and part of its territory[67].

---

61 Annex 3, Vol. 2. Pursuant to Article 50, para. 2, of the Rules of Court, a copy of the original Dutch document has been deposited in the Registry.

62 Annex 4, Vol. 2. Pursuant to Article 50, para. 2, of the Rules of Court, a copy of the original Dutch document has been deposited in the Registry.

63 Annex 7, Vol. 2. Pursuant to Article 50, para. 2, of the Rules of Court, a copy of the original Dutch document has been deposited in the Registry.

64 This historical background is reviewed in the *Nota van Toelichting* (Explanatory Memorandum) to the Contract between The Netherlands Government and the Sultan of Boeloengan, dated 2 June 1878, Annex 19, Vol. 2.

65 Annex 8, Vol. 2. Pursuant to Article 50, para. 2, of the Rules of Court, a copy of the original Dutch document has been deposited in the Registry.

66 In 't Veld, *op. cit.*, at fn. 58, p. 23.

67 Gallois, *op. cit.*, at fn. 58, p. 250.

4.61 In 1844, the States of Sambalioeng, Goenoeng[illegible] Boeloengan formerly constituting Berou were each recognised as separate realms by the Netherlands Indies Government. Their chiefs were officially granted the title of Sultan[68].

4.62 In 1850, the Netherlands Indies Government concluded "Contracts of Vassalage" with the Sultans of each of the three realms in which the respective territories of the realms were given to the Sultans as fiefs. The Contract with the Sultan of Boeloengan was concluded on 12 November 1850[69].

4.63 Because a new Sultan had succeeded to the throne, a new Contract of Vassalage was concluded on 2 June 1878, which was approved and ratified by the Governor-General of the Netherlands Indies on 18 October 1878[70]. It was forwarded to the British Government on 17 January 1880[71].

4.64 In reaction to the activities of the British North Borneo Company, the Netherlands Indies Government decided in 1880 to post some officials in Tawau, a village at the mouth of the river of the same name, on the north-eastern border of Boeloengan. A Dutch warship was posted permanently in the area operating from Tarakan, an island off the coast of Boeloengan[72].

4.65 The first time that the Netherlands Indies Government defined the extent of its territory in Borneo was in connection with the administrative division of Borneo. In an 1846 resolution of the Governor-General, Borneo was divided into two residencies: *Westerafdeling* (Western Division) and *Zuider- en Oosterafdeling* (Southern and Eastern Division). The

---

68 *Nota van Toelichting* (Explanatory Memorandum) op. cit., at fn. 64, Annex 19, Vol. 2.
69 Annex 13, Vol. 2
70 See, Annex 19, Vol. 2.
71 See, Annex 38, p. 2, Vol. 2 and para. 3.22, above.
72 *Koloniaal Verslag van* 1880 ("Report on the Colonies for 1880"), pp. 15-16. *Koloniaal Verslag van* 1881, p. 17. *Koloniaal Verslag van* 1883, p. 16. *Koloniaal Verslag van* 1884, pp. 21-22.

territory of Berou was included in the Southern and Eastern Division[73]. The northern boundary of that residency was defined as the 3° 20' line which the Dutch Government at that time believed to be the northern extent of the territory of the Sultan of Boeloengan[74]. However, the last preambular paragraph of this resolution stated explicitly that the description of the territories of the two residencies "would not affect the claims which the Netherlands may wish to exercise beyond these territories", thus clearly reserving all rights over territory not enumerated. In 1849, a revised decree was issued which did not mention this line but referred to Berou as the northernmost area of the residency[75].

4.66 A description of the geographical area constituting the Sultanate of Boeloengan was included for the first time in the Contract of 12 November 1850. Article 2 of this Contract describes the territory of Boeloengan as follows:

> "The territory of Boeloengan is located within the following boundaries: with Goenoeng-Teboer: from the seashore landwards, the Karangtiegau River from its mouth up to its origin; in addition, the Batoe Becekkier and Mount Palpakh;
>
> "with the Sulu possessions: at sea the cape named Batoe Tinagat, as well as the Tawau River.
>
> "The following islands shall belong to Boeloengan: Terakkan, Nenoekkan and Sebittikh, *with the small islands belonging thereto*.
>
> "This delimitation is established provisionally, and shall be completely examined and determined again"[76].

4.67 In 1877, some changes were made to the administrative division of Borneo. The decree of 1849 was amended by a decree dated 2 February 1877 which divided the residency Southern and Eastern Division of Borneo into six divisions[77]. The sixth northernmost

---

73 Resolution of 28 February 1846, published in the *Javasche Courant*, 7 March 1846, No. 19, with Foreign Office translation, Annex 10, Vol. 2.

74 The line defined in the 1846 resolution as the northern boundary of the residency roughly corresponded with the northern boundary of Boelongan proper, thus leaving the Tidoong countries to the north of this line.

75 Decree by the Minister of State, Governor-General of the Netherlands Indies, of 27 August 1849, No. 8; published in *Staatsblad van Nederlandsch Indie* 1849, No. 40. Translation in Annex 12, Vol. 2.

76 Annex 13, Vol. 2 (emphasis added).

77 The Decree was published in the *Indisch Staatsblad* 1877, N° 31, Annex 14, Vol. 2.

division was named "Koetei and East Coast of Borneo". According to Article 3 of this decree, this division included "the feudal states of Boelongan (to which belong the *Tidoeng countries* and the islands of Terrakan, Nenoekan and Sebittikh with the smaller islands belonging thereto) ...".

4.68 Article 2 of the Contract of Vassalage of 1878 describes the territory of Boeloengan as follows:

> "The territory of the realm of Boeloengan is deemed to be constituted by the lands and islands as described in the statement annexed to this contract"[78].

4.69 The statement annexed to the Contract is identical to Article 2 of the 1850 Contract, except for the last sentence which was deleted.

4.70 This statement was amended in 1893 to bring it in conformity with the 1891 Anglo-Dutch Convention[79]. The new statement is worded as follows:

> "...the Islands of Tarakan and Nanoekan, and that portion of the Island of Sebitik, situated to the south of the above boundary-line, described in the *Indisch Staatsblad* of 1892, No. 114, belong to Boeloengan, *as well as the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line...*" (emphasis added).

4.71 This statement, which was communicated to the British Government on 18 February 1895 and was received by this Government on 26 February 1895[80], was not protested[81].

---

78 Annex 19, Vol. 2.

79 Communicated to the Netherlands Parliament on 13 December 1894. Published in Printed Records of the Second Chamber 1894-1895, No. 110. *Overeenkomsten met inlandschen vorsten in den Oost-Indischen Archipel.* Boeloengan. Gebiedsomschrijving. No. 15. For the English text, see *Conventions between the Government of The Netherlands and Native Princes in the East Indian Archipelago*, communicated by Baron van Goltstein, 26 February 1895, Annex 91, Vol. 3.

80 *Ibid.*

81 See, para. 5.62, below.

4.72 As will be discussed more fully in the next chapter, this confirms that, whatever might have been the uncertainties deriving from the pre-colonial titles to territory, the 1891 Convention was interpreted by both parties as having solved all territorial issues between them, including those concerning the neighbouring islands.

CHAPTER V

THE CONVENTION OF 20 JUNE 1891 BETWEEN GREAT BRITAIN AND THE NETHERLANDS

Section 1. The Background to, and Negotiation and Terms of, the Convention of 20 June 1891

5.1 While for the reasons explained in Chapter IV there were various uncertainties as to the exact location of the boundary between Dutch and British possessions in North Borneo, those uncertainties were brought to an end by the conclusion of the Convention between Great Britain and The Netherlands Defining Boundaries in Borneo of 20 June 1891[1]. The terms of that Convention, and its contemporaneous interpretation by the Parties, leave no doubt as to the inclusion of both Ligitan and Sipadan within the colonial domains of The Netherlands.

A. Background to the Convention of 20 June 1891

5.2 As a consequence of the developments recorded in Chapter IV, the territorial position as it stood at the beginning of the last decade of the 19th century included the following elements:

(i) the extent of the domains of the Sultan of Sulu and the Sultan of Boeloengan on the mainland of Borneo was imprecise, but:

(a) their domains at least met (and probably overlapped) at or near the Sibuko River (the precise location and course of which was itself unclear); and

(b) the Sultan of Boeloengan's domains on the mainland extended to the north of the 4° 10' N parallel of latitude which was later to become relevant;

---

[1] Annex 75, Vol. 3.

(ii) both Sultans were acknowledged to have offshore dominions;

(iii) the extent of the offshore islands forming part of their respective dominions was also imprecise, although the Netherlands Government and the Sultan of Boeloengan maintained that the Sultan's dominions included the islands of Tarakan, Nanoekhan and Sebatik, and the small islands belonging thereto, as stated in the "Contract" (the term used by the Dutch for agreements with local rulers already subject to their suzerainty; sometimes referred to as a "Contract of Vassalage") between The Netherlands and the Sultan of Boeloengan of 12 November 1850 and reaffirmed in the Contract of 2 June 1878;

(iv) although the Sultans of Boeloengan and Sulu effectively dispossessed themselves of their Borneo territories in favour of The Netherlands and (ultimately) Great Britain, the precise limits of their territories were not comprehensively defined in any of the agreed treaties, grants or transfers;

(v) the effect of the successive transactions by which this situation was reached was to leave Great Britain and The Netherlands in undisputed control of the north-eastern areas of Borneo, but without any certainty as to the precise location of the boundary between their respective territories in the coastal region on the east of Borneo.

5.3 In the late 1870s and early 1880s this lack of certainty gave rise to friction between The Netherlands and Great Britain. In 1850, the Netherlands Indies Government had concluded a Contract with the Sultan of Boeloengan, confirming his subjection to Dutch authority[2]. In that

[2] Annex 13, Vol. 2. This Contract was not communicated to the British Government at that time because the Netherlands Government was of the opinion that Article 3, second paragraph, of the Treaty of London of 17 March 1824 between Great Britain and The Netherlands did not require the communication of conventions which did not involve the acquisition of new territory. This provision reads as follows: "It is understood that, before the conclusion of the present Treaty, communication has been made by each of the Contracting Parties to the other of all Treaties or engagements subsisting between each of them respectively, and any native Power in the Eastern Seas; and that the like communication shall be made of all such Treaties concluded by them respectively hereafter". The Dutch Government was of the opinion that the territories of the sultans on the east coast of Borneo had already been ceded to it by their suzerain, the Sultan of Banjermasin (see, Explanatory Memorandum to the Bill for the ratification of the 1891 Convention, Annex 77, Vol. 3). In 1855 the Netherlands Government changed its position as to the meaning of the 1824 Treaty and decided to communicate to the British Government "political contracts" with local rulers already under its suzerainty. See, article "*Contracten*

Contract the territory of Boeloengan was defined as including "Batoe Tinagat, as well as the Tawau River" (see, para. 4.66, above); this Contract was renewed by a further Contract concluded in 1878 in (so far as material) the same terms, and this Contract was communicated to the British Government (see, para. 4.63, above). On the basis of their authority so acquired, in September 1879 the Dutch hoisted their flag at Batoe Tinagat, at parallel 4° 20' N latitude.

5.4 In the early 1880s, Dutch officials were stationed at the nearby village of Tawau, and Dutch warships, based on Tarakan Island, patrolled the north-east coast[3]. The Dutch Government was of the view that on the east coast of Borneo the northern boundary of Dutch territory was formed by the Batoe Tinagat River and further inland by the Tawau River, these being possessions of the Sultan of Tidoeng, a subject of the Sultan of Boeloengan, who had ceded his territories to the Dutch Government long before the concessions were granted by the Sultans of Sulu and Brunei to Dent and Overbeck: thus, the Sultan of Sulu had no right to dispose of those territories. The British rejected this claim, contending instead that this territory belonged to the Sultan of Sulu whose possessions extended as far south as the Sibuko River and who had granted the lands in question to Dent and Overbeck, from whom it had passed on to the British North Borneo Company. Accordingly, in September 1883, the first Governor of North Borneo, W. H. Treacher, sought to assert his territorial rights by sailing in his official launch to the south bank of the Sibuko River where he hoisted the North Borneo flag, fired a *feu de joie*, hauled the flag down again, carved the symbol 'BNB 83' on an adjacent tree, and sailed away: the Dutch immediately chopped down his marker tree[4]. The significant geographical features are illustrated on Map 5.1 facing page 66.

5.5 The geographical essence of the difference between the two Governments was that the Dutch Government asserted that Dutch territory extended at least as far north as the 4°20' N latitude (and possibly further), while the British Government regarded the limit of Dutch territory as extending only as far north as 3°20' N latitude as prescribed by a Dutch resolution of

---

met zelfbesturende landschappen" ("Contracts with self-governing countries") in *Encyclopedie van Nederlandsch Indië*, Vol. 1, p. 526.

3 See, para. 4.64, above.

4 See, Irwin, G., *Nineteenth Century Borneo: A Study in Diplomatic Rivalry*, Martinus Nijhoff, 1955, p. 206.

28 February 1846 (which had been superseded by a later decree in 1849)[5]. Within that basic difference of view, there was further uncertainty as to the location of the Sibuko River which was relied on by the British Government as the southern limit of the territory ceded by the Sultan of Sulu to Messrs Dent and Overbeck: as Count de Bylandt (Netherlands Minister in London) observed in his Note of 1 December 1882 to Earl G. ville (British Foreign Secretary), there were several rivers flowing into St. Luci Bay which bore the name Sibuko[6].

5.6 As British and Dutch levels of activity increased, the line separating their respective possessions became increasingly important. From exchanges of correspondence in 1882 between the Dutch and British Governments[7], it became apparent that:

> "...no positive information could be produced to show what was really intended to be the *exact* position of that River [i.e. the Sibuko River], in the Deeds by which the [British North Borneo] Company became possessed of territory on that part of the coast of Borneo, and it was suggested that the best way of arriving at a settlement of the points in dispute would be for the British and Netherland Governments each to nominate a Commissioner authorized to examine into the question on the spot, with access to all documents and maps, and it was proposed that a Joint Report should then be drawn up by the Commissioners for presentation to their respective Govts. It was further suggested that, in the event of the adoption of this course not resulting in an agreement being come to, recourse might be had to arbitration"[8].

5.7 This proposal was put to the Dutch Government on 13 January 1883. No reply having been received, Sir Horace Rumbold (British Minister in The Hague) was instructed on 9 March 1883 "to propose to the Dutch Govt., as a compromise of all conflicting claims, the acceptance of the 4° of North latitude as the limit to be recognised on both sides"[9]. But the Dutch

---

5 See, paras. 3.18-3.20, above.

6 Annex 31, Vol. 2.

7 Despatches from Count de Bylandt to Earl Granville dated 31 May 1882 and 12 August 1882, Annexes 27 and 29, Vol. 2; despatch from Earl Granville to Count de Bylandt dated 31 August 1882, Annex 30, Vol. 2; despatch from Count de Bylandt to Earl Granville dated 1 December 1882, Annex 31, Vol. 2.

8 Draft *Memorandum on the Disputed Boundary between the British North Borneo Company and the Dutch Possessions on the North East Coast of that Island*, by Sir E. Hertslet, dated 20 December 1888, Annex 36, Vol. 2. (emphasis added). This document is a draft of the Memorandum: the final version has not been traced, but there is no reason to believe that it differed in substance from the draft, which was in the present context merely summarising past developments.

9 *Ibid.*

Government rejected this proposal, which they saw as involving a cession of Dutch territory[10]. Count de Bylandt followed this up with a meeting with Sir Julian Pauncefote (a senior Foreign Office official), which involved a firm restatement by each side of its position.

5.8 There correspondence with the Dutch Government rested for a while, until on 24 January 1884 the British Government renewed their proposal for a joint survey, or a reference of the dispute to arbitration. On 17 March 1884, Count de Bylandt communicated to Lord Granville the copy of a despatch he had received from the Dutch Government in which they maintained that their claim had been clearly established by Count de Bylandt's Notes of 1 December 1882 and 25 March 1883 (which, they observed, had never been answered). No reply was returned to this latest communication either:

> "...as it was thought to be useless to attempt to answer, seriatim, the arguments put forward in the above mentioned notes, until documentary proofs were forthcoming showing the exact limits of the terr[illegible]ry which it was said had been ceded by one native Sultan to the Co[illegible]any and by another, to the Dutch"[11].

5.9 In 1885, the Dutch authorised the preparation of a map on which was marked the boundary which the Dutch Colonial Authorities claimed as the limit of their possessions on the north-east coast of Borneo, and a copy was officially communicated to the British Government on 18 November 1885[12]. The map marked the boundary as starting from Batoe Tinagat, to the north of the Sibuko River, and proceeded almost due north for about 17 miles, and then swept round first in a westerly, and then in a south-westerly direction. A copy of an extract from what is probably the Dutch 1885 map is Map No. 2 in the Map Atlas.

5.10 At this time the British North Borneo Company was active in North Borneo simply as a British company conducting its business in that territory. The British Government thought that there could be advantage for them in their dealings with the Dutch over the boundary if North Borneo were to be placed formally under British protection. The boundary question was therefore left at rest until a decision on this matter had been made.

---

10 Despatch from Count de Bylandt to Foreign Office dated 25 March 1883, Annex 32, Vol. 2.
11 Draft Memorandum by Sir E. Hertslet dated 20 December 1888, Annex 36, Vol. 2.
12 *Ibid.*, p. 2.

5.11 In 1888, Great Britain concluded agreements establishing British protectorates over Sarawak, Brunei and the territory of the British North Borneo Company[13]. The time had "therefore, now arrived for entering into negotiations with the Dutch Government for a settlement of the boundary dispute on equitable terms"[14]. In November 1888, the British Government informed the Dutch Government "that agreements had been formally concluded by which British protection was established" over these territories[15]. The Dutch Foreign Minister (Mr. Hartsen) was "somewhat taken aback" by this news, but hoped that steps would soon be taken to determine boundaries: he "observed how desirable it was that the two Powers who were interested in Borneo should come to a complete understanding which would not leave room for any third Power to step in at any time and claim territory there as being res nullius":[16] he also drew attention to the fact that in a map of the British North Borneo Company's territories recently published by Stanford (apparently a reference to the 1888 Stanford map which appears as Map No. 3 in the Map Atlas and is discussed below at paras. 6.44- 6.45), Batoe Tinagat and the Tawau River were included in the BNBC territory, whereas they were both mentioned in the Contract of 2 June 1878 between the Dutch and the Sultan of Boeloengan as belonging to the Sultan[17].

---

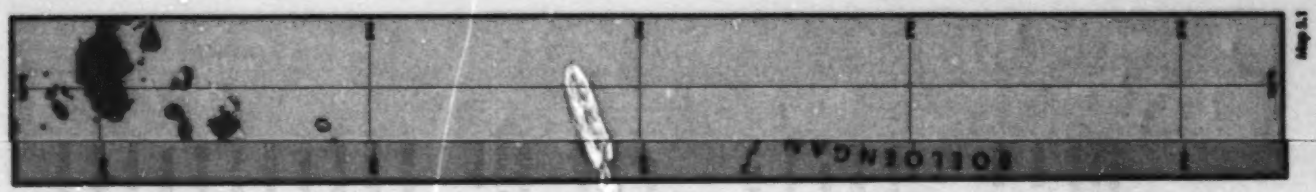
13 The text of these agreements can be found in *British and Foreign State Papers*, vol. 79 (1887-1888), pp. 237, 238 and 240. All three agreements refer to the territory in question as "continuing to be governed [by]... as an independent State under the protection of Great Britain".
It has to be noted that at this time British practice, strictly speaking, distinguished between "protectorates" and "protected States". The distinction was primarily relevant to British constitutional concerns. In both cases the foreign territory in question came under British protection, and in general diplomatic contexts the terms 'protectorate' and 'protected State' were used almost interchangeably to convey the existence of British protection over the foreign territory, without too much regard for the strict constitutional and legal niceties of the terminology used.
Although in many texts the British North Borneo Company is referred to as if it were a State, this was a matter of convenience and did not reflect the strict legal position. The British Government stated, in answer to a question asked in the House of Commons on 25 February 1889, that "[t]he Company is not recognized as an 'independent State', but as administering the government of the independent State of Sabah, under powers and authorities derived from the Sultan of Sulu and the Sultan of Brunei, in consideration of an annual tribute". Parliamentary Debates (Commons), 1889: *Question asked in the House of Commons, 25 February 1889*, Annex 44, Vol. 2.

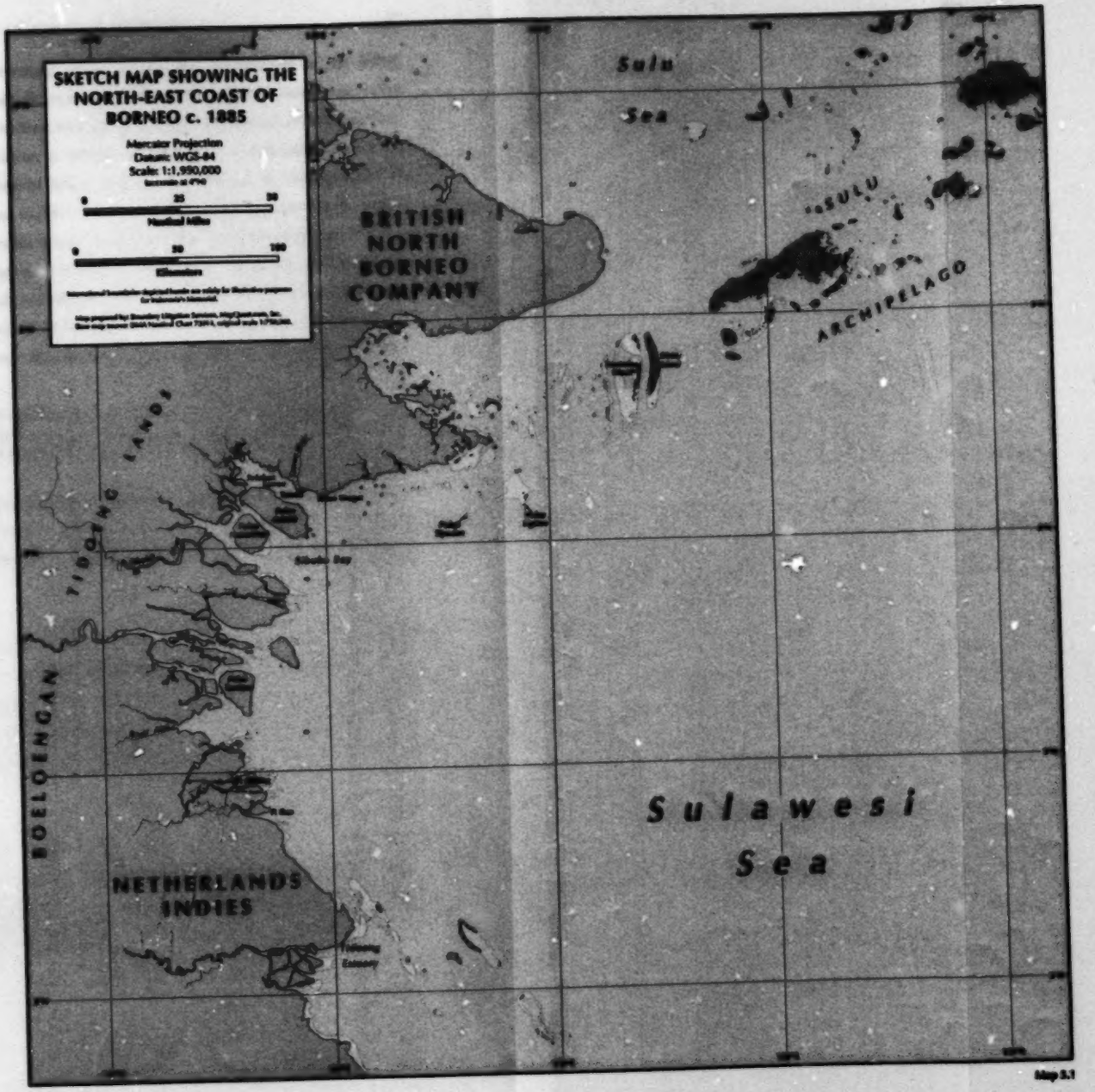
14 Draft Memorandum by Sir E. Hertslet dated 20 December 1888, Annex 36, Vol. 2.

15 Despatch from Sir H. Rumbold (British Minister at The Hague) to Lord Salisbury (British Foreign Secretary), dated 19 November 1888, Annex 35, Vol. 2.

16 *Ibid.*

17 Draft Memorandum by Sir E. Hertslet dated 20 December 1888, Annex 36, Vol. 2. It should be noted that Hertslet refers to the Contract of 2 June 1878 as "the Treaty of 18 October 1878" (this date being that on which the Contract was approved by the Dutch Governor General rather than that of its conclusion). Calling a contract a treaty in this context, although not literally correct, would not have been improper.




SKETCH MAP SHOWING THE NORTH-EAST COAST OF BORNEO c. 1885
Mercator Projection
Datum: WGS-84
Scale: 1:1,950,000
Nautical Miles
Kilometres
Sulu Sea
BRITISH NORTH BORNEO COMPANY
SULU ARCHIPELAGO
TIDONG ISLANDS
BOELOENGAN
NETHERLANDS INDIES
Sulawesi Sea

Map 5.1

5.12 In fact, the Dutch Government considered that the establishment of the British protectorates offered an opportunity for reaching agreement with the British Government on the boundaries of Borneo between Dutch territory and the territory of the British protectorates so as to avoid future disputes. In particular, as explained in the Dutch Government's *Memorie van Toelichting* (i.e. Explanatory Memorandum, sometimes referred to as "Memorandum of Elucidation") 1890-1891 Session, No. 187, No. 3, of 25 July 1891, submitted to the States-General in connection with the ratification of the Anglo-Dutch Convention of 20 June 1891[18], a boundary agreement would put an end to the then current dispute over the boundary on the east coast of Borneo between Dutch territory and that of the British North Borneo Company. Mr. Hartsen addressed a despatch of 22 December 1888[19] which was communicated to Lord Salisbury by Count de Bylandt on 3 January 1889. Mr. Hartsen is recorded as having stated that:

> "...the Boundary question between the Dutch part of Borneo and that where an English Protectorate would be established should be clearly defined *before* the British Protectorate was proclaimed"[20].

The British Minister in The Hague (Sir Horace Rumbold) was instructed to reject that request, as the three protectorate agreements were all signed and ought to be published not later than the forthcoming meeting of Parliament[21] - a rejection which Mr. Hartsen seemed reluctant to accept[22].

5.13 Mr. Hartsen's despatch of 22 December 1888 also set out in considerable detail the basis for The Netherlands' claims to sovereignty along the coast as far north as Batoe Tinagat, and summarised the different arguments advanced by The Netherlands and Great Britain at various times during the 1880s. Sir Edward Hertslet commented upon these in some detail in his *Further Memorandum on the Disputed Boundary between the North Borneo Company and the*

---

18 Annex 77, Vol. 3. See, para. 5.46, below.

19 Annex 37, Vol. 2.

20 Internal minute from Sir E. Hertslet to Sir J. Pauncefote dated 25 January 1889, Annex 39, Vol. 2. (Emphasis in the text).

21 Despatch from Sir H. Rumbold to Lord Salisbury dated 11 February 1889, enclosing Memorandum by British Legation, The Hague, dated 10 February 1889, Annex 41, Vol. 2.

22 Despatch from Sir H. Rumbold to Lord Salisbury dated 18 February 1889, Annex 42, Vol. 2.

Dutch Possessions on the North-East Coast of that Island, 9 January 1889[23]. This Memorandum formed the basis for Lord Salisbury's lengthy despatch of 5 February 1889 to Sir Horace Rumbold, responding to Mr. Hartsen's despatch of 22 December 1888[24]. Both Sir Edward Hertslet's Memorandum and Lord Salisbury's despatch focussed almost exclusively on the mid-19th century history of Dutch and British claims to sovereignty along the east coast of the mainland of Borneo.

5.14 Count de Bylandt approached the Foreign Office on 23 February 1889 to state that, before replying to the last British communication on the boundary question, the Dutch Government would like a map showing the limits of the territory officially recognised by the British Government as belonging to the British North Borneo Company. Sir Julian Pauncefote replied:

> "...that we have no official map, & that the territories comprised in the concessions granted to the Coy [Company] are assumed to belong to them until the contrary is shown. For that reason HMG have reserved to themselves in the Charter of the Coy the right of ascertaining, in case of a difference with a foreign State as to Boundaries, whether the title of the Coy to the territory in dispute is invalid, and ... of imposing on them their decision"[25].

It was thought that the BNBC would probably have a map showing the precise limits of the territories which they claimed, and the BNBC was asked for a copy[26].

5.15 The BNBC duly provided:

> "... two copies of a Map carefully prepared under the direction of the Court of Directors, showing, so far as this is possible in the present

---

23 Annex 38, Vol. 2.

24 Annex 40, Vol. 2.

25 Memorandum by Sir J. Pauncefote dated 23 February 1889, Annex 43, Vol. 2. As noted below, para. 7.11, Sir Julian Pauncefote's explanation clearly demonstrates that both the BNBC and the British Government acknowledged that the limits of the territories they claimed were questionable, including therefore the southern limits in the area disputed with the Dutch.

26 Letter from Sir J. Pauncefote to British North Borneo Company dated 28 February 1889, Annex 45, Vol. 2.

state of geographical knowledge, the limits which they claim in Borneo"[27].

The BNBC also noted that the boundaries in question were necessarily subject to final settlement on further and more precise knowledge of the physical features of the country or otherwise, and continued:

> "...unless, in the absence of such data - only to be acquired by scientific exploration - it should be deemed desirable by the two Governments of Great Britain and the Netherlands, to prevent protracted delay in the negotiations, and other reasons, to adopt a parallel of latitude to be mutually agreed upon as a preferable boundary"[28].

The map was sent to the British Minister in The Hague for passing on to the Netherlands Government[29]. It did not impress the Dutch Government[30].

5.16 In response to Lord Salisbury's lengthy despatch of 5 February 1889 (above, para. 5.13), the Dutch Foreign Minister (Mr. Hartsen) sent an equally lengthy reply dated 19 March 1889[31], which was delivered to the Foreign Secretary (Lord Salisbury) by the Dutch Minister in London, Count de Bylandt, at a meeting on 27 March 1889. Lord Salisbury recorded that at the meeting Count de Bylandt expressed the opinion:

> "...that it was not likely that any satisfactory issue would be reached by the exchange of arguments in despatches, and asked whether I would consent to remit the question [i.e. of the boundary] for consideration and advice to a small Committee [of representatives of the two States]"[32].

---

27 Letter from British North Borneo Company to the Foreign Office dated 8 March 1889, Annex 46, Vol. 2. Presumably the map referred to in this correspondence is the map prepared by Stanford in 1888 (see, Maps No. 3 and No. 4 in the Map Atlas).

28 *Ibid.*

29 Despatch from Lord Salisbury to Sir H. Rumbold dated 23 March 1889, Annex 48, Vol. 2.

30 Despatch from Lord Salisbury to Sir H. Rumbold dated 3 (or possibly 8) April 1889, Annex 50, Vol. 2.

31 Annex 47, Vol. 2.

32 Draft despatch from Lord Salisbury to Sir H. Rumbold dated 27 March 1889, Annex 49, Vol. 2.

Count de Bylandt's oral proposal was confirmed in writing on 6 April 1889[33]. This proposal was accepted by Lord Salisbury[34], after it had been clarified that the discussions would not exclude any matters in dispute and that the outcome of the discussions would not bind the parties but would simply establish a starting point for a definitive agreement[35].

5.17 Discussions began in London on 16 July 1889. Great Britain appointed Sir Philip Currie, Permanent Under-Secretary of State for Foreign Affairs, and Sir Edward Hertslet, as the delegates for the British Government[36]; the delegates appointed to act for the Dutch Government were Count de Bylandt, Dutch Minister in London, and Mr. A. H. Gysberts, official of the Netherlands Ministry of the Colonies. In preparing for the meetings, Sir Edward Hertslet (Foreign Office Librarian, and at that time also used by the Foreign Office as [illegible]egal adviser before it had a permanent legal staff), wrote a paper setting out certain issues which he suggested should be addressed by the joint committee[37]. In it he noted that the Dutch claims went as far north as about latitude 4°19', which "if admitted, would overlap a portion of the territory claimed by the British North Borneo Company, who maintain their right to territory as far south as the Sibuko River, in north latitude about 4°10'..." - apparently a first mention of that particular latitude in the papers relating to the negotiations.

5.18 The Minutes of the Proceedings of the Joint Commission, which met on 16, 19 and 27 July 1889, are at Annexes 57, 58 and 59 hereto. At the outset, the agreed basis on which the Joint Commission was meeting was set out by Sir P. Currie, for Great Britain[38]. He noted that the Commission should determine certain particular matters (in effect, those previously recorded by Sir Edward Hertslet), and that it had been agreed:

> "...further, that, in the event of a satisfactory understanding being arrived at with regard to the disputed boundary between the Netherland Indian Government and the British North Borneo

---

33 Annex 51, Vol. 2.

34 Despatch from Lord Salisbury to Count de Bylandt dated 28 June 1889, Annex 55, Vol. 2.

35 Despatch from Lord Salisbury to Count de Bylandt dated 20 May 1889, Annex 52, Vol. 2, and despatch from Count de Bylandt to Lord Salisbury dated 3 June 1889, Annex 53, Vol. 2.

36 Despatch from Lord Salisbury to Count de Bylandt dated 28 June 1889, Annex 55, Vol. 2.

37 *Memorandum respecting proposed Bases for a Joint Commission on the North Borneo Boundary*, by Sir E. Hertslet dated 19 June 1889, Annex 54, Vol. 2.

38 Record of the Proceedings of the Joint Commission Meeting on 16 July 1889, at pp. 1-3, Annex 57, Vol. 3.

> Company, on the north-east coast, in the neighbourhood of the Sibuco River, the British and Netherland Governments will proceed without delay to define, short of making an actual survey, and marking the boundary of the spot, the inland boundary-lines which separate the Netherland possessions in Borneo from the territories belonging to the States of Sarawak, Brunei, and the British North Borneo Company respectively."

Thus, the boundary on the coast was the first matter to be decided, and if that could be agreed the two Governments would rapidly settle the boundary inland - an approach confirmed at the end of the third meeting on 27 July 1889[39].

5.19 In the discussions both parties rehearsed in some detail their existing positions. At the end of the second meeting Count de Bylandt noted that the question at issue was really one of prestige: it was impossible for the Dutch to withdraw from territory without a loss of dignity in the eyes of the natives, but the Dutch Government could grant to the British North Borneo Company absolute freedom of navigation on all rivers in the disputed territory. For Great Britain, Sir P. Currie noted that England's prestige had also to be considered: but he appreciated Count de Bylandt's conciliatory language, and wondered whether the matter might not be settled by an amicable compromise. He:

> "...inquired whether the Dutch Government would be prepared to consider the question of an arrangement on the basis of a compromise of the territorial claims on the coast-line, with free navigation of the rivers running through the disputed territory?"[40]

5.20 This suggestion for a compromise (repeating the earlier proposal of 1883, para. 5.7, above) was approved in principle by the Dutch Government, subject to whatever the actual proposal for a compromise settlement might prove to be[41]. The British Government then submitted a proposal, the main elements of which were:

---

[39] Record of the Proceedings of the Joint Commission Meeting on 27 July 1889, at pp. 2-3, Annex 59, Vol. 3.

[40] Record of the Proceedings of the Joint Commission Meeting on 19 July 1889, at p. 11, Annex 58, Vol. 3.

[41] *Ibid.*, at pp. 11-12, and Record of the Proceedings of the Joint Commission Meeting on 27 July 1889, at p. 1, Annex 59, Vol. 3.

(a) "the boundary-line on the coast [i.e. the east coast] should start from the point called Broers Hoek, in about 4°10′ north latitude, and should pass between the Islands of Sebattik and East-Nanockhan"; and

(b) there would be freedom of shipping on all rivers in the disputed area lying between 3°20′ and 4°20′ north latitude[42].

The proposal that the line should pass between Sebatik and Nanoekhan reflected proposals made earlier by the British North Borneo Company to the British Government, illustrated on a map prepared by Stanford in 1888 showing such a line with its continuation out to sea[43].

5.21 The Dutch Government needed to consult the Sultan of Boeloengan about these proposed arrangements, but Count de Bylandt did not anticipate any difficulty since the Dutch authorities had influence over him[44]; further, any agreement would "require the sanction of the States-General [i.e. The Netherlands' legislature], over whom his Government had no control"[45]. Since the inland boundary was dependent upon the boundary on the coast being settled, Sir P. Currie wanted to know how long the reference to the States-General would take[46]. Count de Bylandt said that the States-General would meet in September, but that it was impossible to say when the Dutch Government would be in a position to lay the matter before the States-General[47].

5.22 The Sultan of Boeloengan's response was that he was content with the proposed arrangements, although he sought for the population of Boeloengan a 15 year tax-free right to collect forest products in the area between Broershoek and Batoe Tinagat[48].

---

42 *Ibid.*, at pp. 1-2.
43 Map No. 3 in the Map Atlas.
44 Record of the Proceedings of the Joint Commission Meeting on 27 July 1889, at p. 3, Annex 59, Vol. 3.
45 *Ibid.*
46 *Ibid.*
47 *Ibid.*
48 *Explanatory Memorandum on the Ratification of the Anglo-Dutch Convention of 20 June 1891*, at p. 4, Annex 77, Vol. 3.

5.23 Three points may be noted about the course of the discussions in the Joint Commission.

(a) First, the provisional agreement reached by the Joint Commission was for the boundary on the coast to "start from" the point at "about 4°10' north latitude", and should then "pass between the Islands of Sebuttik and East Nanockhan". In other words, the boundary was clearly envisaged in principle as one which, starting on the coast, ran eastwards *at sea* for an indeterminate distance (although at least between the two named islands), i.e., out to the open sea.

(b) It is not clear from the available records why the parallel of 4°10' N latitude was chosen as the line which, where it crossed the coast, would serve as the coastal boundary. It is, however, noteworthy that (i) it was approximately the latitude at which the Sibuko River (which was claimed by the British to have been the southern limit of the Sultan of Sulu's territories, and thus of the territories administered by the British North Borneo Company) was thought to run into the sea (para. 5.17, above); (ii) it was almost exactly mid-way between the original British offer of a boundary at 4°N (para. 5.7, above) and the Dutch claims of a boundary at Batoe Tinagat (lying at about 4°19' N – para. 5.13, above); and (iii) since the Dutch Government regarded acceptance of the 4°10' N line as not involving the loss of any possessions which were unquestionably Dutch, while acknowledging that their more northerly claimed areas were not indisputable, that line met the essential Dutch requirement for keeping as Dutch all possessions to the south of that line[49]. In short, the 4°10' N parallel appears to have been consistent with the essential territorial interests of all concerned, and thus to have represented a mutually acceptable compromise (in line with Sir P. Currie's original suggestion: paras. 5.19-5.20, above).

(c) Third, while in their discussions of the boundary dispute attention was focussed on the problems inland and on the coast, offshore islands were not ignored. Apart from the foregoing reference to islands in the context of the proposed coastal starting point for the

---

[49] *Ibid.*, at p. 6; see, also, despatch from Sir H. Rumbold to Lord Salisbury dated 9 March 1892, Annex 83, Vol. 2 and statement by the Dutch Foreign Minister in the ratification debate on 8 March 1892, at pp. 32 *et seq.*, Annex 84, Vol. 3. Pursuant to Article 50, para. 2, of the Rules of Court, a copy of the original Dutch text of the Parliamentary Papers referred to in this chapter has been deposited in the Registry.

boundary line, at the meeting on 16 July 1889 the statement of Mr. von Dewall referred to "the Tidoeng Islands, Tarrakkan, Nanoekkan, and Sebittikh"[50], and at the meeting on 19 July 1889 reference was made to the decree of the Governor-General of Netherlands India of 2 February 1877, which had specified "the Islands of Sibittich, Nanoekkan, and Tarakkan as belonging to the Netherlands"[51].

B. The Negotiations for the Convention of 20 June 1891

5.24 In assessing the present legal significance of the agreement eventually reached, it is very relevant that throughout the second half of the 19th century the history of the north-eastern area of Borneo saw a steady increase in the territorial extent of British authority at the expense of the Dutch: in effect the Dutch were on the retreat, yielding territory to which they had strong claims. They were accordingly at pains to limit the extent of any concessions to be agreed in the negotiations with the British. The eventual 1891 Anglo-Dutch Convention has to be seen in that light.

5.25 The boundary at the coast having effectively been settled in the earlier discussions as being at parallel 4°10′ N, from this stage onwards the negotiations focussed primarily on the boundary running westwards from this point, i.e. inland into the mainland of the island of Borneo. This occupied the attention of the negotiators for several important reasons: the inland boundary was very long and ran through exceedingly difficult terrain, with many mountains and thick forest; it was unexplored; the local Sultans (of Brunei, and Sarawak) and the British North Borneo Company had no clear idea as to the inland limits to their territories (see, paras. 4.13-4.16, 4.32-4.39, above); the interior of Borneo contained many rivers and, while their coastal outlets were generally known, their inland courses, and their sources, were obscure; and many of these rivers were important trading waterways, making navigation rights important. By comparison, the eastward boundary out to sea was relatively straightforward, Dutch and British practical requirements centering mainly on problems associated with secure rights of navigation

[50] Annex 57, Vol. 3, at p. 11.
[51] Annex 58, Vol. 3, at p. 10.

between the open sea and the mainland rivers in the vicinity of 4°10′ N, particularly around the island of Sebatik which lay astride the principal navigation routes in the immediate approaches to the Sibuko river.

5.26 So far as presently relevant it was recorded in a Dutch memorandum of 2 April 1890 that at the meetings of the Joint Commission in July 1889 "Broershoek, in parallel 4°10′, [was] fixed [i.e. by the Joint Commission] as the starting point of the boundary on the eastern coast", and the Dutch proposed that Sebatik should remain Dutch[52]. Inland, the Dutch proposed that the boundary should be at the watershed of certain rivers[53]. They also asked whether the British Government was willing to accept the lines of boundary which separated Sarawak, Brunei and North Borneo from the Dutch possessions in Borneo, as defined in a Dutch official map[54].

5.27 The British Government consulted the British North Borneo Company which in reply prepared a *Memorandum on the Southern Boundary of the Territory of the British North Borneo Company*, dated 22 July 1890[55]. The British Government responded to the Dutch Government's request in Lord Salisbury's despatch of 13 August 1890 to Count de Bylandt[56]. Lord Salisbury expressed the British Government's readiness "to accept Broershoek, the point on the coast where the parallel of 4°10′ north latitude meets the sea", and to give up any claims to territory on the coast south of that point provided the Dutch gave up any claims to territory to the north. Given the state of ignorance as to the geography inland, the British Government also proposed that the 4°10′ N parallel should be followed inland until it reached a range of mountains separating the Dutch possessions from those of Brunei: this was thought to be equally fair to both parties, "inasmuch as it is absolutely a matter of conjecture where the rivers rise which empty themselves into the sea to the north or south of Broershoek at 4°10′ north latitude". If the Dutch could accept this, the British Government "would be prepared to recognize the dividing lines, already marked on the Dutch Official Map [i.e. the map previously referred to] ..., leaving

---

52 Annex 60, Vol. 3.
53 As summarised in the despatch from Lord Salisbury to Count de Bylandt dated 13 August 1890, Annex 62, Vol. 3.
54 Map No. 3, in the Map Atlas.
55 Annex 61, Vol. 3.
56 Annex 62, Vol. 3.

any differences which might possibly hereafter arise with regard to the actual position of any particular locality to be settled by mutual agreement between the British and Netherland Governments". Furthermore, the British Government proposed that Sebatik should be within the boundaries of the British North Borneo Company, "or that the boundary-line should run along the parallel of 4°10' eastward, as well as westward, from Broershoek, so as to divide the island equally between themselves and the Netherland Government". A further alternative (a Dutch lease of the northern part of the island to the Company in perpetuity for a nominal rent) was also mentioned as a possibility.

5.28 Thus, while the British Government at first wanted the whole island of Sebatik to belong to the British North Borneo Company, the Dutch Government rejected this. The British Government then proposed that the whole island should be Dutch, but that the northern part be given to the Company on long or indefinite lease on nominal payment; the Dutch rejected this too. Instead, the Dutch Government preferred that the island (which was uninhabited) be divided, with the parallel of 4°10' N as the boundary between the two parts:

> "... as a result of this partition the Netherlands and the British North Borneo Company will each possess that part of the island which constitutes the shore of the navigation channel along which they must reach the coastal area allocated to them; this is fair and rational"[37].

5.29 The Dutch response was given in Count de Bylandt's Note of 2 February 1891 to Lord Salisbury[38]. Count de Bylandt noted that there were only two points outstanding - the British proposal that the 4°10' N line should form the frontier from the coast to the range of mountains referred to, and the proposals for the island of Sebatik. On the former question, the Dutch made a counter-proposal. On the latter, the Dutch were ready to accommodate the wishes of the British North Borneo Company by "lui cédant sans restriction la partie de cette île située au nord du degré 4°10' latitude nord", provided that the British Government accepted the Dutch

---

[37] *Explanatory Memorandum on the Ratification of the Anglo-Dutch Convention of 20 June 1891*, at p. 5, Annex 77, Vol. 3.

[38] Annex 67, Vol. 3.

proposals for the boundary inland. It may be noted that, in using the term "lui cédant" (i.e., "ceding to it"), the Dutch implied that sovereignty over Sebatik vested in The Netherlands: there is no record of any British rejection of this necessary implication.

5.30 In commenting, on 21 February 1891, upon the Dutch counter-proposal, the British North Borneo Company, whose principal object was to have under their jurisdiction both sides of the bay into which the Kalabacking River flows and whose understanding was that this object would "be secured by following the parallel of 4°10′ across the island", were willing on this point to accept the proposal of the Netherlands Government[59].

5.31 The Foreign Office, however, had not waited for this expression of the company's views. On 11 February 1891 Lord Salisbury addressed a despatch to Count de Bylandt[60]. Lord Salisbury set out his understanding of the Dutch proposal as being (so far as now relevant) that the Dutch Government was willing "to continue the parallel of 4°10′ eastward across the Island of Sebattick, and give the northern part of that island unreservedly to the Company provided the above proposal [regarding the inland boundary] be accepted". He continued:

> "I have now the honour to inform you that Her Majesty's Government are prepared to accept the boundary-line thus described ....
>
> "I avail myself of this opportunity to transmit to you the headings of a draft Agreement embodying the result of our several communications on the subject of the boundaries in Borneo between the possessions of the Netherlands and those of the British North Borneo Company, Sarawak and Brunei respectively, which I trust may coincide with the views of the Netherlands Government."

5.32 The enclosed "Headings of Draft Agreement between the British and Netherlands Governments" were (so far as now relevant) in the following terms:

> "ARTICLE 1. The boundary between the Netherlands possessions and those of the British North Borneo Company shall start from 4°10′ north latitude on the north-east coast of Borneo.

---

[59] Despatch from B. Kindersley, Secretary of the British North Borneo Company, to Foreign Office dated 21 February 1891, Annex 70, Vol. 3.

[60] Annex 68, Vol. 3.

"Art. 2. The line shall be continued *westward* from 4°10' and follow ... [i.e. the inland boundary]

...

"Art. 4. From 4°10' north latitude on the north-east coast the line shall be continued *eastward* along that parallel across the Island of Sebittick; that portion of the island situated to the north of that parallel shall belong unreservedly to the Company, and the portion south of that parallel to the Netherlands.

...

"Art. 7. The boundary between the Netherlands possessions and the States of Brunei and Sarawak shall be defined by the respective watersheds, ... leaving the exact positions to be determined hereafter by mutual agreement when the country is more developed"[61].

5.33 Count de Bylandt replied to Lord Salisbury's despatch by a Note dated 2 May 1891, making certain counter proposals, but more of form than of substance[62]. These were acceptable to the British Government, and Lord Salisbury so informed Count de Bylandt on 25 May 1891, at the same time sending him a draft Convention incorporating the various amendments suggested by the Dutch Government[63]. On 9 June 1891, Count de Bylandt proposed a small number of drafting changes to the draft Convention of which the only one to affect the terms of the articles presently relevant was the replacement in Article IV of the word "line" by "boundary-line"[64]. These amendments were accepted by Lord Salisbury in his note of 12 June[65]. The Convention, amended accordingly, was signed on 20 June 1891[66].

---

61 Emphasis in the text.
62 Annex 71, Vol. 3.
63 Annex 72, Vol. 3.
64 Annex 73, Vol. 3.
65 Annex 74, Vol. 3.
66 Text of the Convention between Great Britain and The Netherlands Defining Boundaries in Borneo dated 20 June 1891, Annex 75, Vol. 3.

C. Survey by HMS *Egeria*, HMS *Rattler* and HNLMS *Banda*, June 1891

5.34 Meanwhile, on 29 December 1890 the British Government instructed Sir Horace Rumbold to propose to the Dutch Government that it would be useful if there were a visit to the area by one of HM ships "to ascertain the exact point where 4°10′ north latitude reaches the sea, on the clear understanding that any mark which the British naval officers may think it necessary to place is without prejudice to the conflicting claims of the Netherlands East India Company and the British North Borneo Company with regard to the boundary of their respective territories on the east coast of Borneo"[67]. The Dutch Government had no objections, but suggested that the visit should be undertaken in conjunction with officers from a Dutch naval vessel, and that the purpose should be extended so as to explore and determine the course of the Rivers Simengaris and Soodang, which fall into the sea near Broershoek[68].

5.35 In the event, HMS *Egeria* and HMS *Rattler* visited the area to perform this task, to which was added, at the suggestion of the Dutch Government in April 1891, the fixing of the positions of 4°10′ north latitude on both coasts of the island of Sebatik[69]. During June 1891, HMS *Rattler* and HMS *Egeria* carried out their appointed tasks (together with the Dutch vessel HNLMS *Banda*), and submitted reports on, respectively, 23 June 1891 and 30 June 1891[70], copies of which were officially transmitted to the Dutch Government; the HNLMS *Banda's*

---

[67] Despatch from Lord Salisbury to Sir H. Rumbold dated 29 December 1890, Annex 63, Vol. 3; see, also, despatch from Sir P. Currie to Admiralty dated 28 January 1891 and despatch from Mr. Green, British Chargé d'Affaires at The Hague, to Lord Salisbury dated 4 January 1891, Annexes 66 and 64, Vol. 3.

[68] Despatch from Mr. Hartsen to Mr. Greene, British Chargé d'Affaires at The Hague, dated 20 January 1891, Annex 65, Vol. 3.

[69] See, despatch from E. MacGregor, Admiralty, to the Foreign Office dated 20 February 1891; despatch from Lord Salisbury to Sir G. Bonham dated 25 February 1891; despatch from E. MacGregor, Admiralty, to the Foreign Office dated 25 February 1891; despatch from Sir G. Bonham to Lord Salisbury dated 27 February 1891, enclosing despatch from Sir G. Bonham to Mr. M. Hartsen dated 27 February 1891; despatch from Sir H. Rumbold to Lord Salisbury dated 8 April 1891, enclosing despatch from Mr. M. Hartsen to Sir H. Rumbold dated 7 April 1891; despatch from Sir P. Currie, Foreign Office, to Admiralty dated 10 April 1891; despatch from Lord Salisbury to Sir C. Smith dated 17 April 1891; despatch from E. MacGregor, Admiralty, to the Foreign Office dated 15 April 1891; despatch from Lord Salisbury to Sir H. Rumbold dated 17 April 1891 and despatch from Lord Salisbury to Sir C. Smith dated 18 April 1891, Annex 69, Vol. 3.

[70] Despatch from E. MacGregor, Admiralty, to the Foreign Office dated 24 September 1891, enclosing despatch from Lieutenant-Commander J. Heugh to Vice-Admiral Sir W. Richards dated 23 June 1891 and despatch from Commander A. Mostyn Field to the Admiralty dated 30 June 1891, Annex 78, Vol. 3.

report was submitted to the Governor-General of the Netherlands Indies on 27 July 1891, and was subsequently officially transmitted to the British Government[71].

5.36 It is thus apparent that in the period immediately preceding, and also contemporaneous with, the conclusion of the 1891 Convention, the Dutch were directly engaged in maritime activities in the area and were unwilling to let British naval vessels carry out such activities on their own.

5.37 In addition to his formal report, the Commander of HMS *Egeria* also submitted a letter to the Hydrographer of the Royal Navy describing the erection of beacons on the 4°10' N parallel on the mainland of Borneo, and on the west and east coasts of Sebatik[72]. (As to the subsequent replacement of these beacons, see, para. 5.40, below.)

5.38 A map, entitled *Plan Showing the Result of the Determination of Parallel of 4 °10' N on East Coast of Borneo, and Examination of Rivers in Vicinity*, June 1891 appears to be the "tracing" referred to in the Admiralty letter of 24 September 1891 as illustrating the combined work of the two British vessels[73]. On 27 October 1891, the British Minister in The Hague was instructed to convey the tracing to the Dutch Foreign Minister[74]. The Foreign Minister (now Mr. van Tienhoven) replied on 1 December 1891 to Sir G. Bonham at the British Legation in The Hague, saying that as the report of the British officers was consistent in all essentials with those by the Dutch officers concerned (copies of which he enclosed), "mon Gouvernement n'a... aucune objection à accepter les résultats obtenus"[75]. The tracing shows the parallel of 4°10' N running across the island of Sebatik and continuing eastwards, and it is therefore to be noted that

---

71 Despatch from Sir G. Bonham to Lord Salisbury dated 4 December 1891, enclosing despatch from E. van Tienhoven to Sir H. Rumbold dated 1 December 1891, translation of despatch from Vice-Admiral Röell to the Governor-General of Netherlands India dated 27 July 1891 and Report of Dutch Surveying-vessel HNLMS *Banda* of 30 May and 11 July 1891, Annex 80, Vol. 3.

72 *Observations on Spot near North Point of East Nenukong Island*, by Commander A. Mostyn Field dated 1 July 1891, Annex 76, Vol. 3.

73 In the late 19th century the principal method used for copying maps was to have the originals traced onto partially transparent paper. The resulting copies were known as 'tracings'. The map referred to above appears as Map No. 6 in the Map Atlas.

74 Annex 79, Vol. 3.

75 Despatch from Sir G. Bonham to Lord Salisbury dated 4 December 1891, enclosing despatch from E. Van Tienhoven to Sir. H. Rumbold dated 1 December 1891, Annex 80, Vol. 3.

one of the results on which both Governments had expressed their agreement was this tracing showing the relevant parallel extending out to sea.

5.39 In addition to the official reports of this survey expedition, an account by "A.M.F." (apparently Commander A. M. Field, of HMS *Egeria*) also appeared in *The British North Borneo Herald*, on 1 November 1892[76]. So far as directly concerns the Sipadan and Ligitan islands, the following references in that account may be noted:

- a reference to survey observation stations on Pulau Gaya, Si Amil, Sandi Islet and Mabul Island "and another on Sipadan Island completed the chain of main stations ..." (at p. 377, col. 1): outer islands were thus clearly in peoples' minds at the time;

- the erection of marker beacons on the 4°10'N line (at p. 377, col. 2 - p. 378, col. 1);

- "The survey of the South coast of Darvel bay extending from Silam in the North-west to Richard's Reef ..., thence by the Eastern side of Pulo Gaya on to Si Amil Island and stretching to the westward as far as *Egeria* shoal including Sipadan Island was completed on the 15th August ..." (at p. 379, col. 2);

These references to Ligitan and Sipadan, in an account of a survey conducted by British vessels in association with a Dutch vessel at the time of the conclusion of the 1891 Convention, show that those islands were very much in mind at the time, were hydrographically significant, and were in waters which it was important to survey properly in the general interests of navigation.

5.40 For completeness it should be added that, although beacons had been erected by HMS *Egeria* on the east and west coasts of Sebatik, it appears from correspondence in 1914, arising out of a survey by HMS *Merlin* in 1910 "in the vicinity of the boundary between British and Dutch territory on the east coast of Borneo" that new markers were erected in 1899 by the Dutch

[76] Annex 89, Vol. 3.

naval vessel HNLMS *Flores*, and that of the three such markers two - on the east coast of the Borneo mainland, and on the west coast of Sebatik - had been replaced by wooden tripods, and these tripods were marginally further to the south than the true location of the 4°10′ N line[77]. However, when the British Government raised the matter with the Dutch Government, the latter explained that the tripods were now strictly irrelevant to the boundary line, since they had been replaced as boundary markers by granite posts erected in 1901 under the supervision of the Dutch naval vessel HNLMS *Makasser* and the British vessel HMS *Waterwitch*. The frontier was thereupon marked not by the beacons or tripods but by the granite posts, the two Governments agreeing in correspondence in 1902 that the posts correctly marked the line of the frontier between Dutch and British territories in Borneo, as indicated in Article V of the 1891 Convention, in so far as that line crossed the east coast of Borneo and the east and west coasts of Sebatik. Dutch naval activity in the area was indeed a feature of the years around the turn of the century. During the period 1897-1903, a comprehensive hydrographic surveying project was undertaken by the Dutch Navy off the eastern coast of Borneo. In October and November 1903 the Dutch hydrographic surveying vessel HNLMS *Makasser* completed the last part of this project in the area east of Sebatik island. Detailed measurements were made covering this entire area, including in the general area of the islands of Sipadan and Ligitan[78]. A number of corrections were made to the data obtained in 1891 by the British vessel HMS *Egeria*. The resulting Dutch chart (No. 59) was published in 1905[79]. It is thus apparent that Dutch activity in the area continued after the conclusion of the 1891 Convention.

Section 2. The Terms of the Convention of 20 June 1891

5.41 The purpose of the Convention, as stated in its preamble, was to define "the boundaries between the Netherlands possessions in the Island of Borneo and the States in that island which are under British protection".

---

77 Despatch from Admiralty to Under Secretary of State, Foreign Office dated 5 March 1914 and despatch from Secretary General of Dutch Ministry of Foreign Affairs to Sir. A. Johnstone, Foreign Office, dated 7 April 1914, Annexes 116 and 117, Vol. 4.

78 See report by the Commander of HNLMS *Makasser* to the Commander Naval Forces Netherlands Indies dated 26 November 1903, Annex 105, Vol. 3.

79 Memorandum on Hydrographic Surveying Activities by the Dutch Navy in the Netherlands Indies, dated 16 February 1948, Annex 127, Vol. 4.

5.42 (a) The Convention, concluded for that purpose, provided, in Article I:

> "The boundary between the Netherland possessions in Borneo and those of the British-protected States in the same island, shall start from 4°10′ north latitude on the east coast of Borneo."

(b) Articles II and III delimited the boundary westward across the island of Borneo. Most of the Convention, in fact, dealt with the boundary running inland and westwards from the east coast of Borneo, and is not directly relevant to the matters presently in issue.

(c) As regards the boundary running eastwards from the east coast of Borneo, there had been much debate: see paras. 5.26 and 5.27, above. In the event, Article IV delimited the boundary eastwards from the point on the coast identified in Article I, and provided as follows:

> "From 4°10′ north latitude on the east coast the boundary-line shall be continued eastward along that parallel, across the Island of Sebittik: that portion of the island situated to the north of that parallel shall belong unreservedly to the British North Borneo Company, and the portion south of that parallel to the Netherlands."

5.43 It is evident that, taking as a starting point the east coast of Borneo at latitude 4°10′ N, Article IV continues the boundary line eastwards along that parallel of latitude. Several things are noteworthy about these territorial dispositions.

(a) First, Article I establishes that the boundary is to be between "possessions"; i.e. the boundary is to be a line providing for the territorial attribution of possessions to The Netherlands and to Great Britain respectively on either side of the line laid down in the Convention. Doing so by way of adopting a straight line extending across maritime areas was a usual method, adopted particularly by colonial powers, of identifying sovereignty over a myriad small islands, known and unknown, spread over large sea areas: the alternatives would be to ignore them or to name each and every one, neither of which would be safe or practicable for the States concerned.

(b) Second, Article IV provides that, from the starting point laid down in Article I, the boundary line is to be "continued eastward"; the notion of "continuation" does not embrace a line of only limited extent with a nearby terminal point, but rather a line of indeterminate extent.

(c) Third, in the absence of any specified limit to the continued eastward extent of the boundary line, its implied limit is derived from the context of the Convention, which was to divide territorial possessions and to settle definitively the whole problem of the limits of the British and Dutch possessions in the area: the line therefore continued so far as necessary to divide islands or territories whose attribution might be problematical and was therefore to be determined.

(d) Fourth, given the Dutch belief that the territories of the Sultan of Boeloengan had included various islands, including certain small islands adjacent to the main islands of Tarakan, Nanoekhan and Sebatik, and the desire on both sides to settle the boundary problem once and for all (as to which see, also, paras. 5.56-5.59, below), an interpretation of Article IV of the 1891 Convention which would leave the attribution of the various small offshore islands undecided must be rejected as inconsistent with this purpose. The 4°10′ N line, continued eastward, decides their attribution consistently with that purpose, in the light of which the Convention is to be interpreted[80].

(e) Fifth, the history of the negotiations shows that the initial British proposal was for a boundary line to run eastward from Broershoek (at 4°10′ N) and then through the channel between the islands of Sebatik and Nanoekhan (see, e.g., paras. 5.20 and 5.23 (a), above): such a maritime line is inherently a line continuing out to sea, since there is no territorial limit at which it might be pretended that it should cease. The displacement of that line in the eventual agreement to a more northerly course, wholly along the 4°10′ N parallel, with nothing more said about its terminal point, similarly, and consistently with the course of the negotiations, results in a line which continues to run out to sea.

(f) Sixth, the only indication given as to the location of the line is that it was to be continued "along that parallel", i.e. the 4°10′ N parallel. The use of the term "along", which connotes passage through the length of something, in conjunction with "continued" confirms the meaning of that term as indicating a line of indeterminate length.

---

[80] Vienna Convention on the Law of Treaties 1969, Article 31.1, 1155 *UNTS* 331, reprinted in 8 *ILM* 679 (1969).

(g) Seventh, the main part of the sentence provides that the boundary line shall continue eastward along the named parallel of latitude, and its meaning cannot be restricted by construing the following subordinate phrase ("across the Island of Sebittik") as a territorial limit upon the extension eastwards of the boundary line fixed at 4°10′ N. The placement of a comma between the main clause and its subordinate element shows that the subordinate element is not a limiting part of the main clause, but is merely a subsidiary description, for purposes of clarification, of the course taken by the overall boundary line prescribed by the main clause in relation to the principal island along its course.

(h) Eighth, the ordinary meaning of the word "across", in the context of the phrase "across the island of Sebittick" in Article IV, conveys the sense of "through and beyond", or "crossing and continuing over", the island of Sebatik. The ordinary meaning of the word in that context is not such as to convey the sense of the boundary crossing the island and then stopping at its east coast.

(i) Ninth, the fact that Article IV takes the boundary across the island of Sebatik shows that the boundary prescribed in the 1891 Convention is not limited to the main island of Borneo. The general boundary line at parallel 4°10′ N latitude is related in particular to the island of Sebatik because of that island's size and location.

(j) Tenth, moreover, the need to make special mention of the island of Sebatik is explained by the negotiating history of the Convention, in which the attribution of the island featured prominently (see, paras. 5.25 *et seq.*, above). In prescribing a continuous boundary line eastwards along the parallel 4°10′ N it was necessary to make clear that that meant following that parallel across the island, thereby demonstrating that neither of the other two options (Sebatik to be wholly British, or wholly Dutch) was being adopted: that clarification, in a subsidiary clause, does not serve to place a limit on the principal thrust of the text, which is that the boundary continues eastwards along the 4°10′ N parallel.

(k) Eleventh, there was no contemporaneous reason why the 4°10′ N line should have extended out to the high seas for any reason other than the attribution of islands to one party or the other.

(l) Twelfth, continuation of the 4° 10′ N line out to sea was consistent with the location of other Dutch possessions to the east, to the south of the Philippines; this is readily apparently from the map which appeared as Exhibit 11 to the Memorandum submitted by the United States in the *Island of Palmas* arbitration[81].

(m) Finally, the evident interest of both parties to the Convention in maritime rights of access to the estuary of the Sibuko River (e.g. para. 5.25, above) and their contemporaneous joint maritime activities in the area, including Ligitan and Sipadan (e.g. paras. 5.34 *et seq.*, above), show that their concerns did not stop at the eastern limit of Sebatik but continued eastwards into navigationally significant waters out to sea.

Section 3. Ratification of the Treaty

5.44 Article VIII of the Convention provided that it was to be ratified, and that it was to come into force after the exchange of ratifications which was to:

> "...take place at London one month, or sooner if possible, after the said Convention shall have received the approval of the Netherland States-General".

Instruments of ratification were duly exchanged in London on 22 May 1892.

5.45 It is significant (see, para. 5.51, below) that special mention was made of the need for approval by the States-General of The Netherlands. Under the constitutional law of The Netherlands at the time, a treaty of the kind now in question had to be approved by the States-General before it could be ratified by the Crown of The Netherlands, and the importance of this approval was accordingly affirmed in Article VIII. So far as concerned Great Britain, however,

---

[81] Map No. 8 in the Map Atlas.

the treaty did not, according to British constitutional practice at the time, require any equivalent parliamentary approval, and ratification was a process left entirely to the discretion of the Crown (in effect, the Government of the day).

5.46 In order to secure the approval of the States-General, the Dutch Government, in accordance with the constitutional requirements, submitted to the States-General a Bill, accompanied by a *Memorie van Toelichting* (i.e. Explanatory Memorandum) 1890-1891 Session, No. 187, No. 3, of 25 July 1891[82]. The purpose of such a Memorandum was to explain to the States-General the significance of a proposed treaty, and why its conclusion was in the interests of The Netherlands.

5.47 The Memorandum stated (at p. 5) that the Government had concluded that:

> "The result of the negotiations on the boundary through the disputed area on the eastern coast is that on the basis of the starting point, as proposed by the British Government, at a latitude of 4°10' North at Broershoek on the coast the boundary is much more favourable than what had been desired by the British. This can be seen from the map attached to this Memorandum ...".

5.48 A copy of the map referred to (the "Explanatory Memorandum Map") appears facing page 90 as Map 5.2[83]. It shows four different boundary lines:

- a blue line: the boundary claimed by The Netherlands;
- a yellow line: the boundary claimed by the British North Borneo Company;
- a green line: the boundary suggested by the British Government;
- a red line: the boundary line agreed in the Convention of 20 June 1891.

---

82 Annex 77, Vol. 3.

83 The map is also reproduced as Map No. 5 in the Map Atlas.

5.49 Apparently sensitive to possible criticisms that the Dutch Government had conceded territory to the British, the Memorandum continued:

> "Although comparison of these different boundary lines may give the impression that the Netherlands has given up part of its territory, it should not be forgotten that before a dispute about the boundary arose the Netherlands Government had never paid much attention to its territory on the eastern coast of Borneo, which was unknown to it and also completely uninhabited, that the rights of the Sultan of Bulungan to the disputed area are not totally unchallengeable and, finally, that instead of a highly uncertain boundary through a stretch of unknown and inaccessible country a very accurately delineated boundary has now been accepted which obviates all difficulties in the future not only concerning the part of Borneo to which the boundary dispute related but also concerning the whole island"[84].

5.50 The Explanatory Memorandum map, and in particular the red line drawn on it, shows that the boundary line as agreed followed the parallel of latitude 4°10′ N starting at the eastern coast of Borneo, crossing the waters at the mouth of the estuary of the River Sibuko and the island of Sebatik, and then *continuing eastwards beyond that island* and out to sea in a direction running to the north of Pulau Sipadan and Pulau Ligitan. It thus clearly shows that Pulau Sipadan and Pulau Ligitan fall on the Dutch side of the boundary line agreed in the Convention.

5.51 The map is a contemporary exposition by the Dutch Government of the meaning of Article IV of the 1891 Convention. In particular:

(a) The map was an integral part of the process of ratification of the Convention, required by the terms of Article VIII of the Convention. As the Court said in the *Ambatielos* case:

> "The ratification of a treaty which provides for ratification... is an indispensable condition for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance"[85].

---

[84] Annex 77, Vol. 3, at p. 6.

[85] *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 28, at p. 43.

Particular and specific significance was attached in Article VIII to the need for the approval of the States-General.

(b) The map is clear evidence of the intention of the Dutch Government at the time of the conclusion of the 1891 Convention, and of its understanding of the effect of Article IV in particular.

(c) It is also clear evidence of the basis on which the States-General gave its approval of the Convention, as required by Article VIII as an express precondition for the entry into force of the Convention.

(d) It demonstrates the meaning attributed to Article IV by The Netherlands when subsequently exchanging instruments of ratification with Great Britain on 22 May 1892. Moreover, not only does it show that the Dutch Government understood that in the eastern part of Borneo the Convention established a boundary line between possessions offshore as well as on the mainland, but (by comparison with the delineation of the boundary at the western end of the land boundary) it also shows that was intentional.

(e) The map was a publicly available document, and was published in the official records of the Dutch parliament along with the Explanatory Memorandum itself[86].

(f) The map was known to the British Government at the time in the context of the 1891 Convention (para. 5.54, below). Given the absence of protest on the part of Great Britain (para. 5.63, below), Great Britain accepted the interpretation of the Convention reflected by the map.

(g) Moreover, the map is thus also an "instrument which was made by one .. part[y] in connection with the conclusion of the treaty and accepted by the other part[y] as an instrument related to the treaty" within the meaning of Article 31.2(b) of the Vienna Convention on the Law of Treaties 1969 - a provision which corresponds to the position in customary

---

[86] See, paras. 5.53-5.54, below.

international law; as such the map forms part of the context of the treaty, for purposes of its interpretation.

5.52 The circumstances surrounding the preparation, publication and communication to Great Britain of the Explanatory Memorandum map are similar to those surrounding the so-called *Livre jaune* map which was accepted by the Court as playing an important part in the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case[87]. A Franco-British "Additional Declaration" had been adopted on 21 March 1899: it defined a boundary line by description in the text, but no map was attached to the Declaration. A few days after its adoption the French Ministry of Foreign Affairs published the text of the Declaration, with a map annexed, in a "*Livre jaune*". This map was also annexed to the official text of the Declaration kept in the Ministry's Archives. The same map was attached to the *exposé des motifs* which accompanied the draft law authorising ratification of the Declaration before both the French Chamber of Deputies and the Senate on 27 March 1899. The map had also been published in the French press. Despite such clear and contemporaneous public awareness of the map, no protest or other dissent from it was made by the British Government. Although, in fact, the map differed in certain respects from the description of the boundary given in the text of the Franco-British Declaration, the Court treated the map as an authoritative interpretation of that Declaration[88].

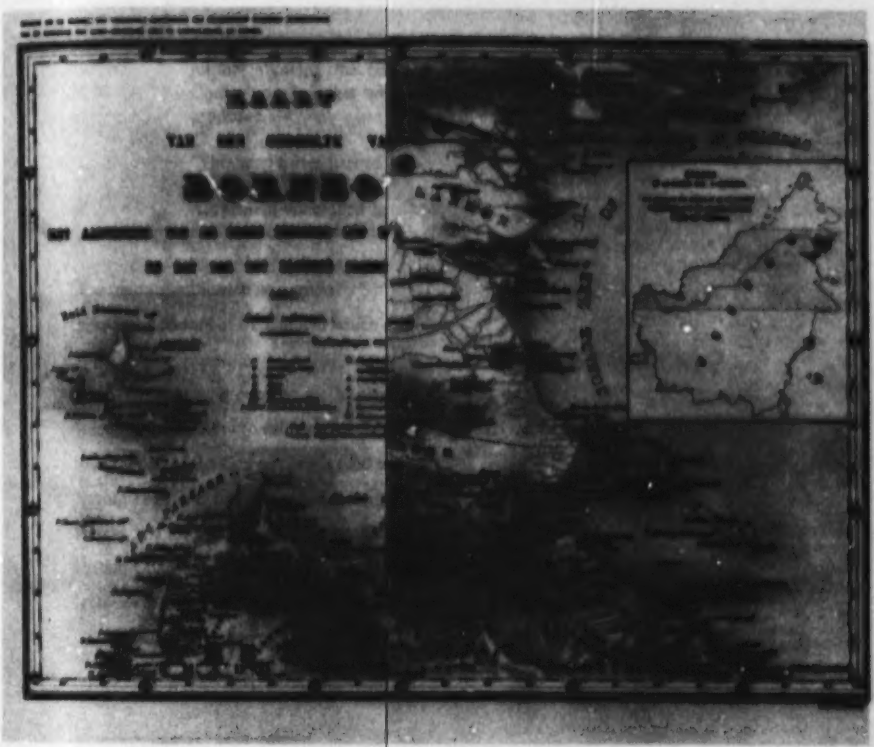
5.53 The Explanatory Memorandum map, after being submitted to the States-General as part of the Explanatory Memorandum, has been kept as part of the Netherlands' State archives at the "*Algemeen Rijksarchief*" in The Hague.

5.54 On the British side, the British Government, through its Legation in The Hague, were informed of the Explanatory Memorandum and the map annexed to it. As part of Great Britain's normal observation of events in The Netherlands which affected British interests, the Legation followed the developments in the States-General relating to the approval of the 1891 Convention

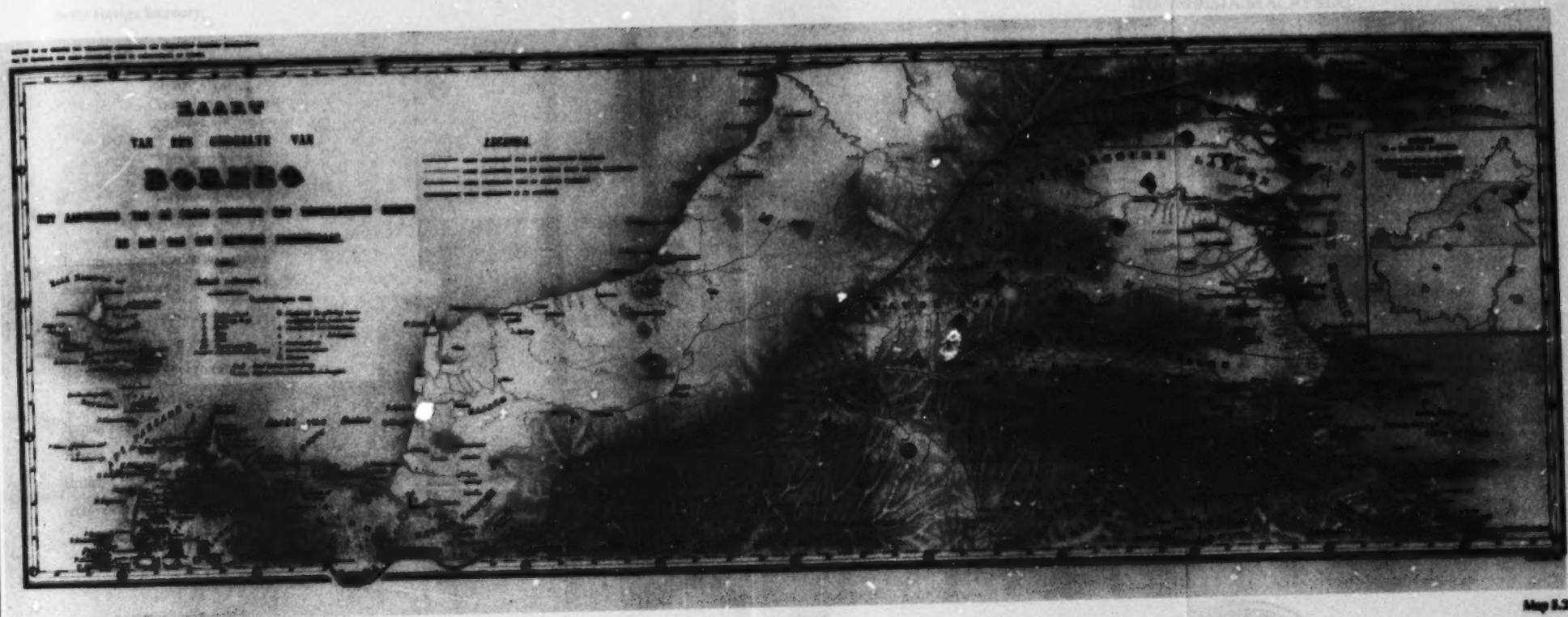
---

87 *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6.

88 *Ibid.*, at p. 16, para. 28, p. 30, para. 58, p. 37, para. 61, and p. 34, paras. 64-65.



Map 5.2



Map 5.3

- a matter of public knowledge at the time, and an important matter of obvious and direct interest to Great Britain (as evidenced by the regular and full diplomatic reporting of developments in the Dutch Parliament, including the preparation of full translations of the debate[89]). The Legation reported these developments back to London, accompanying its reports with copies of relevant documents. In his despatch No. 9 of 26 January 1892[90] Sir Horace Rumbold sent back to the Foreign Secretary:

> "...two copies of a Map which has lately been published in the official journal showing the boundary-line as agreed upon under the late Convention, together with the boundaries which had been previously proposed.
>
> "This map forms part of a Report presented to the Second Chamber of the States-General by a Committee appointed to examine the Agreement concluded last year by the Governments of Great Britain and the Netherlands"[91].

The map's significance was noted by Sir Horace Rumbold in adding that it "seems to be the only interesting feature of a document which does not otherwise call for special comment".

5.55 Moreover, a copy of the Explanatory Memorandum map is held at the British Public Record Office, Kew (catalogue ref. FO 925 No. 2541). That map, although not formally an integral part of the Convention, is filed together with the Convention, presumably as a result of it having been concurrently reported back to the Foreign Office by the British Legation in The Hague, and for general convenience. It at least appears, from the letter of 29 July 1994 from the British Chargé d'Affaires in Jakarta, that the Convention and map were placed in the British archives at the same time 103 years earlier, i.e., in 1891[92].

---

89 See, para. 5.57, below.

90 Annex 81, Vol. 3.

91 In certain respects Sir Horace Rumbold misreported the Dutch Parliamentary processes. The map was submitted by the Government to the Second Chamber as part of the procedure for obtaining approval of the Convention. The Second Chamber referred the map, along with the Explanatory Memorandum which it accompanied, to a Committee for examination. The map, as well as the Memorandum, was published in the official records of the Parliament, but not in the Official Journal (*Staatsblad*).

92 Annex 175, Vol. 4.

5.56 Following the second Chamber's comments in its *Voorlopig Verslag* [i.e. Preliminary Report], the Government responded in its *Memorie van Antwoord* [i.e. Memorandum of Reply]. In this the Government replied to the Committee's comments, and explained:

> "...the advantages of the arrangement come to, as settling for good and all the entire question of the boundaries between Dutch and British protected territory in Borneo, everything situated to the South of the line of demarcation agreed upon being now expressly recognised as 'the Netherlands possessions in the island of Borneo'"[93].

5.57 On 8 March 1892, the Second Chamber of the States-General approved the 1891 Convention unanimously[94]. Sir Horace Rumbold later sent a copy of a full translation of the debate which took place in the Second Chamber of the States-General[95].

5.58 During the course of the debate, Mr. van Tienhoven (Minister for Foreign Affairs) emphasised the benefit to The Netherlands of having definitively settled the British-Dutch boundaries in Borneo and so avoiding the possibility of future disputes, especially when it was borne in mind that none of the boundaries was clearly defined before, with disputes constantly arising:

> "*Lites finire oportet* is as applicable to public as to private claims, and after the long continued dispute about the fixing of the boundary line of our territory in Borneo and our attitude in that island as regards England the solution now arrived at may be designated as a very desirable one...
>
> "The disputes which have arisen are now terminated, and those which might otherwise arise in the future are as far as practicable prevented....
>
> "The dispute will be terminated by the ratification of this treaty and difficulties in the future will be prevented"[96].

---

93 Despatch from Sir H. Rumbold to Lord Salisbury dated 23 February 1892, Annex 82, Vol. 3.
94 Despatch from Sir H. Rumbold to Lord Salisbury dated 9 March 1892, Annex 83, Vol. 3.
95 Despatch from Sir H. Rumbold to Lord Salisbury dated 18 March 1892, Annex 84, Vol. 3.
96 *Ibid.*, at pp. 33, 34 and 42.

Thus the Foreign Minister - consistently with his predecessor's wish in 1888 that the parties should come to a "complete" understanding (para. 5.11, above) - was at pains to emphasise the belief of The Netherlands that an end had been put to all disputes about the Anglo-Dutch Borneo boundary, from which it follows that no known territorial question - such as that concerning offshore islands - had been left unresolved.

5.59 The importance of stability and finality as important objectives in boundary settlements was noted by the Court in the *Temple of Preah Vihear* case. The words of the Court in that case apply, *mutatis mutandis*, with equivalent force to the present situation; the Court said:

> "Various factors support the view that the primary object of the Parties in the frontier settlements of 1904-1908 was to achieve certainty and finality. From the evidence furnished to the Court, and from the statements of the Parties themselves, it is clear that, the whole question of Siam's very long frontiers with French Indo-China had, in the period prior to 1904, been a cause of uncertainty, trouble and friction, engendering what was described in one contemporary document placed before the Court as a state of 'growing tension' in the relations between Siam and France. The Court thinks it legitimate to conclude that an important, not to say a paramount object of the settlements of the 1904-1908 period (which brought about a comprehensive regulation of all outstanding frontier questions between the two countries), was to put an end to this state of tension and to achieve frontier stability on a basis of certainty and finality"[97].

5.60 In this respect, the Court was following earlier pronouncements in which the importance of the finality and completeness of settlements of disputed boundaries was relied on as a basis for their interpretation. In its Advisory Opinion on *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (1925) the Permanent Court noted that:

> "It is... natural that any article designed to fix a frontier should, if possible, be so interpreted that the result of the application of its provisions in their entirety should be the establishment of a precise, complete and definitive frontier"[98].

---

[97] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 34-35.

[98] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925, P.C.I.J., Series B, No. 12*, at p. 20.

To similar effect was the observation of the Court in *Sovereignty over Certain Frontier Land*, that:

> "Any interpretation under which the Boundary Convention is regarded as leaving in suspense and abandoning for a subsequent appreciation of the *status quo* the determination of the right of one State or the other to the disputed plots would be incompatible with that common intention",

namely, the common intention expressed in the preamble to "fix and regulate all that relates to the demarcation of the frontier"[99]. The equivalent preambular language in the 1891 Convention (which is entitled "Convention... defining boundaries in Borneo") records that the parties were "desirous of defining the boundaries between the Netherland possessions in the Island of Borneo and the States in that island which are under British protection"[100].

5.61 The ratification of the Convention also required the approval of the Bill by the First Chamber of the States-General. This was quickly forthcoming. It is significant that the Government, in response to an assumption expressed in the Final Report of the Committee of Rapporteurs adopted on 31 March 1892[101], gave the reassurance that the Government recognised that its duty was to ensure that "the rights in relation to local rulers both in Borneo itself *and on the neighbouring smaller islands* are regulated in such a way that difficulties with other Powers need never be feared with regard to their respective claims"[102]. This removes any possible ambiguity over the interpretation of the 1891 Convention and the fact that it way meant to resolve all territorial issues once and for all.

5.62 Following on the ratification and entry into force of the 1891 Convention, the definition of the territorial extent of Boeloengan agreed in the Contracts of vassalage of 1850 and 1878

---

99 *Sovereignty over Certain Frontier Land, Judgment, I.C.J. Reports 1959*, p. 209, at pp. 221-222.

100 Annex 75, Vol. 3.

101 Annex 85, Vol. 3.

102 *Proceedings of the First Chamber of the States-General, 1891-1892*, 15th meeting, 1 April 1892, speech by Mr Van Dedem, Minister for the Colonies (unofficial English translation), at p. 3, Annex 86, Vol. 3. (Emphasis added).

(paras. 4.68, 4.70 and 4.71, above) was amended to bring it into conformity with the Convention. The new text, in relevant part, read:

> "...the islands of Tarakan and Nanoekan, and that portion of the Island of Sebitik, situated to the south of the above boundary-line described in the *Indisch Staatsblad* of 1892, No. 114, belong to Boeloengan, as well as the small islands belonging to the above islands, *so far as they are situated to the south of the boundary-line*..."[103].

This new text was communicated to the British Government on 26 February 1895. The final 12 words of this text show that the Dutch Government continued to regard - and so informed the British Government - the effect of the 1891 Convention as being to establish a line of territorial attribution extending out to sea, thus reinforcing the equivalent interpretation evidenced by the Explanatory Memorandum map. This new text removes any doubt which there could otherwise be regarding the ownership of Ligitan and Sipadan. Taken together with the circumstances surrounding the Explanatory Memorandum map, it shows that immediately following the conclusion and entry into force of the 1891 Convention, The Netherlands was firmly of the opinion that – in keeping with the previous situation – the islands lying south of the 4° 10' N parallel belonged to it, and this was not challenged by the British Government which was officially notified of this interpretation.

5.63 The significance of the British Government's silence in the face of official communications to it of maps and texts demonstrating the Dutch Government's interpretation of the 1891 Convention can scarcely be overstated. Despite the British Government's knowledge of the Explanatory Memorandum map - drawn to its attention at the highest level (by despatch to the Foreign Secretary) - no record has been found, either in British or Dutch sources, of any dissent on Great Britain's part from the delineation of the boundary depicted on the map or of any British protest against the map or the relevant parts of the Memorandum to which it was annexed. This knowledge, coupled with lack of protest or other dissent, implies Great Britain's

---

[103] Annex 91, Vol. 3. (Emphasis added).

assent to the content of the map, and thus to its depiction of a boundary line in a position such that Pulau Sipadan and Pulau Ligitan form part of The Netherlands' territory. Great Britain, by its implied agreement to the interpretation of Article IV of the Convention as understood by the Dutch Government, and thus its acceptance of the map as an accurate reflection of the intention and meaning of the 1891 Convention, is thus legally committed to the Explanatory Memorandum map, which accordingly represents the parties' agreement on the matter. This situation having arisen as a direct part of the process surrounding the conclusion of the Convention, the parties can be said to have adopted the map as part of their treaty settlement, as their agreed interpretation of Article IV of the 1891 Convention.

5.64 In this respect the situation bears considerable similarities to that which obtained in the *Temple of Preah Vihear* case. There, a map (referred to as "the Annex I map") representing the work of a demarcation commission which had the task of demarcating a boundary set out in an earlier treaty of 1904 was communicated to the Siamese authorities (the forerunners of the present-day Thai authorities): the map delineated a line which was argued not to be in all respects identical with the line of the watershed adopted by the terms of the treaty. The Court concluded that:

> (i) "the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"
>
> (ii) "Even if there were any doubts as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it."
>
> (iii) "Both Parties, by their conduct, recognised the [Annex I] line and thereby in effect agreed to regard it as being the frontier line."
>
> (iv) "The Court considers that the acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it. It cannot be said that this process

> involved a departure from, and even a violation of, the terms of the Treaty of 1904, wherever the map line diverged from the line of the watershed, for, as the Court sees the matter, the map (whether in all respects accurate by reference to the true watershed line or not) was accepted by the Parties in 1908 and thereafter as constituting the result of the interpretation given by the two Governments to the delimitation which the Treaty itself required. In other words, the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty[104]."

In the present case, the Parties' predecessors in title can be seen to have agreed upon the line shown in the Explanatory Memorandum map as the correct interpretation of the 1891 Convention, as part of their treaty settlement of the disputed boundary between them in the Borneo region. Moreover, in the present case, the line shown in the Explanatory Memorandum map, unlike the map in the *Temple* case, does not depart from the line of the 1891 Convention.

5.65 In the Convention itself, the parties recognised from the outset that the boundary described in the Convention would need further elaboration in detail. They made provision accordingly. Article V provided:

> "The exact positions of the boundary-line, as described in the four preceding Articles, shall be determined hereafter by mutual agreement, at such times as the Netherland and the British Governments may think fit."

By two later agreements - concluded in 1915 and 1928[105] - effect was given to this provision in relation to parts of the 1891 Anglo-Dutch boundary line. Clearly, since the line had been determined by reference to a parallel of latitude, its seaward extension did not call for any further precision, nor did circumstances at sea allow for any specific demarcation.

---

104 *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at pp. 23 and 32-34.

105 Annex 118, Vol. 3, and Annex 125, Vol. 4. Pursuant to Article 50, para. 2, of the Rules of Court, copies of the maps attached to the respective agreements have been deposited in the Registry.

Section 4. Conclusions

5.66 The facts and arguments deployed in this chapter demonstrate that, whatever doubts there might have been up to the late 1880s as to the course of the dividing line between Dutch and British possessions in north-eastern Borneo, with the conclusion and ratification of the Convention of 20 June 1891 between Great Britain and The Netherlands any such doubts were finally set aside.

5.67 The Convention, by its terms, its context, and its object and purpose, established the 4° 10′ N parallel of latitude as the dividing line between the parties' respective possessions in the area now in question. The islands presently in dispute – Ligitan and Sipadan – lie to the south of that parallel. It therefore follows that under the Convention title to those islands vested in The Netherlands, and now vests in Indonesia.

5.68 By its conduct at the time, and in particular by virtue of the Explanatory Memorandum map and its variation of the Contract with the Sultan of Boeloengan, the Dutch Government demonstrated its understanding of the meaning to be attributed to Article IV of the 1891 Convention. It did so by means which were not only public knowledge at the time, but also by means of which the British Government were officially informed. Great Britain's failure to protest, or in any other way to dissent from the Dutch Government's views of which it had such public and official knowledge, showed that it accepted those views as the correct interpretation of the 1891 Convention.

5.69 It follows that title to the islands now in dispute was settled in favour of The Netherlands, and now (by way of succession) in favour of Indonesia, by virtue of the treaty settlement embodied in the 1891 Convention.

5.70 In turn, it further follows (as decided by a Chamber of the Court in the *Frontier Dispute* case[106]), that, while subsequent *effectivités*, whether in the form of official maps or of other evidence of State activity, can (if they are in accordance with the legal title established by treaty) serve to confirm that legal title, they cannot (if they are contrary to that legal title) serve so as to overthrow the legal title derived from and based on the Convention.

5.71 It is within this framework that, in the following chapters of this Memorial, Indonesia will consider the activities of the Parties to this dispute, and of other relevant States, which may have a bearing on Indonesia's title as established by the 1891 Convention.

[106] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at pp. 586-587, para 63.

CHAPTER VI

RESPECT OF THE 1891 LINE IN PRACTICE

6.1 In this part of the Memorial, Indonesia will demonstrate that, following the conclusion of the 1891 Treaty, both The Netherlands and Great Britain and, subsequently, Indonesia and Malaysia, in practice treated the 1891 Treaty line as one allocating sovereignty over offshore islands eastward of Sebatik Island with both of the disputed islands in this case being treated as Dutch and, later, Indonesian territory.

Section 1. Activities of The Netherlands and Indonesia with Respect to the Islands

A. Dutch Activities

6.2 A highly relevant example of such practice following the 1891 Convention is provided by the policing activities carried out in the area by ships of the Royal Netherlands Navy for the purpose of protecting the coastal population against acts of piracy and robbery by the Bajau Laut tribe originating from the Sulu Archipelago. A report by the commanding officer of a Dutch naval vessel present in the area in 1921 provides a detailed account of one such expedition.

6.3 The HNLMS destroyer *Lynx*, carrying a seaplane on board, patrolled the area in November and December 1921. From the excerpt of the report submitted by its commander to the Commander Naval Forces Netherlands Indies, who had provided the instructions to the commander, it can be seen that the Dutch authorities considered both Pulau Ligitan and Pulau Sipadan to be islands under Dutch sovereignty, whereas other islands situated north of the

1891 line (e.g., Si Amil) were considered to be British[1]. This is demonstrated by the fact that the commander of the *Lynx* sailed within the territorial sea of Sipadan and sent an armed sloop to the island for the purpose of checking if there were any pirates present, but stayed outside the 3 nautical mile territorial sea limit of islands such as Si Amil lying north of the 4° 10' N line of latitude. The commander of the *Lynx* had a number of wireless contacts with the British official in Tawau who was kept informed of the *Lynx's* ongoing policing activities. The Commander Naval Forces Netherlands Indies also directly informed the British Consul-General in Batavia (Jakarta) of the voyage of the *Lynx*. The British raised no protests over the *Lynx's* activities.

6.4 More specifically, the report shows that on 24 November 1921 a seaplane launched by the *Lynx* stayed just outside the three-mile limit of Si Amil, where reports had been received as to pirate activity, to interview a number of Bajau Laut present there on small boats. On 26 November, an armed sloop was sent from the *Lynx* to Sipadan on which were found a few itinerant fishermen. The same day the seaplane made a further reconnaissance trip to Si Amil, once again staying three miles from the island. Instructions received by the commander later that day specifically refer to arresting pirate boats outside British territorial waters and to the fact that the British authorities were being notified accordingly. On 28 November, the seaplane again landed and stayed just outside the three mile limit of Si Amil. On 30 November and 1 December, the *Lynx* sailed close to Sipadan, staying outside the territorial sea of Si Amil in the process, after which it proceeded to the vicinity of Ligitan. The seaplane made a tour of Ligitan to the west, navigating through the airspace of the islands south of the 1891 line.

6.5 In short, the report demonstrates that the commander of the *Lynx*, following his instructions, scrupulously respected the 1891 Treaty line as allocating territorial sovereignty over the offshore islands in the area (and, consequently, the territorial sea areas generated by

---

[1] A copy of the relevant extracts from the Report attached to a letter dated 4 January 1922 (with English translation) is attached as Annex 120, Vol. 4.

such islands). In particular, the landing on Sipadan of armed Dutch naval personnel and the visit to the vicinity of Ligitan constituted acts *par excellence* of the exercise of governmental authority with respect to the islands. Moreover, the report reveals that suspicious vessels suspected of piracy were warned to stay clear of Dutch territorial waters. As a result, Pulau Ligitan and Pulau Sipadan were treated as Dutch islands.

B. Indonesian Activities

(i) Naval Patrols to the Islands

6.6 Prior to the emergence of the dispute in 1969, the Indonesian Navy was also active in the area, visiting Sipadan on several occasions. Attached as Annexes D, F, G and H are four affidavits prepared by Indonesian naval personnel who participated in a number of visits to the islands between 1965 and 1968.

6.7 These visits are significant in three respects. First, they demonstrate that Indonesia considered the islands to fall under its sovereignty. At no time were any Indonesian naval patrols authorised to visit any islands lying north of the 4° 10′ N latitude belonging to Malaysia. The patrols were limited to Sipadan and Ligitan and other Indonesian islands lying in the vicinity of Sebatik. Second, it is clear from each of the reports that, at the time, both Sipadan and Ligitan were uninhabited. Third, at least one of the patrols was prompted by a report that foreign fishermen had been spotted poaching sea resources from the islands. In response to these reports, an Indonesian naval unit was sent to Sipadan in December 1967, but reported "there was no sign or indication that there was any person living on that island"[2]. No protests were forthcoming from Malaysia regarding any of these visits.

6.8 After 1969, the Indonesian Navy continued to undertake periodic visits to the islands. These activities are discussed further in Chapter VIII[3].

---

2 See, the affidavit of Sailor 1st Class Ilyas regarding a visit to the islands in 1967 attached at Annex D, Vol. 5.

3 See, para. 8.92, below.

(ii) Traditional Fishing Activities

6.9 Indonesian fishermen have also traditionally plied their trade around the islands of Sipadan and Ligitan. In Annexes I, J, K, L and M, the Court will find a series of five affidavits which provide examples of the kinds of traditional fishing activities that Indonesian fishermen carried out on and around the islands. These statements record visits to the islands dating back to the late 1950s and early 1960s. They also show that Indonesian fishermen continued to fish around the islands, sometimes staying overnight on Sipadan, in the early 1970s after the dispute had emerged.

Section 2. The Oil Concession Activities of the Parties

6.10 During the 1960s, both Indonesia and Malaysia started granting offshore oil prospecting licenses east of Sebatik island. It is highly significant that, in carrying out these activities, both Parties respected the 4° 10′ N latitude as forming the limit of their respective jurisdictions. Indeed, in 1967 the Malaysian Government published an official map which depicted the Malaysian concessions as lying north of the 4° 10′ N line and showing the 4° 10′ N line itself as constituting the international boundary between Indonesia and Malaysia stretching from Sebatik island well to the east of Sipadan and Ligitan[4]. As such, the offshore petroleum activities of the Parties confirm that both Indonesia and Malaysia regarded the 4° 10′ N latitude established by the 1891 Convention as defining the limits of their sovereign rights.

A. The Indonesian JAPEX Concession

6.11 The first petroleum licence granted by Indonesia to a foreign company in the relevant area was a Production Sharing Agreement entered into on 6 October 1966 between the Indonesian State-owned company, P.N. Pertambangan Minjak Nasional ("PERMINA"), and

---

[4] A copy of this map faces page 106 of this Memorial and is reproduced in the Map Atlas as Map No. 16.

Sulu
Sea
MALAYSIA
Sulawesi
Sea
"Offshore Bunju Area"
INDONESIA
1966 PERMINA / JAPEX
CONCESSION
Concession Area
Mercator Projection
Datum: WGS-84
Scale: 1:1,950,000
0
35
70
Nautical Miles
0
50
100
Kilometers

the Japan Petroleum Exploration Co., Ltd ("JAPEX")[5]. The contract covered two different areas, the limits of which were set out in Exhibits A and B to the agreement.

6.12 The first preambular clause of the agreement provided as follows:

> "PERMINA has an exclusive 'Authority to Mine' for mineral oil and gas in and throughout the areas described in Exhibit A and B attached hereto and made a part hereof."

6.13 For purposes of the present case, it is the offshore contract area described in Exhibit A-2 which is of particular relevance. As can be seen from Map 6.1, the northern limits of the contract area extended from the east coast of Sebatik island due east along the 4° 9' 30" N parallel of latitude to a distance of some 27 nautical miles offshore. This latitude was carefully chosen so as to respect the 4° 10' N line, stopping 30 seconds of latitude – or approximately 900 metres – south of that line so as to ensure that petroleum operations would not encroach upon areas lying north of that line appertaining to Malaysia. The licence did not give rise to any objections from the Government of Malaysia.

6.14 On 25 July 1970, the Total Oil Company of France obtained a 50 percent participation interest in the contract area along with JAPEX. Further participating interests in the licence were subsequently awarded to Calasiatic Oil Company and TOPCO in October 1975, and to the German oil company Deminex in December 1979.

6.15 In the event, the exploration activities of these companies were unsuccessful, and the contract was terminated on 5 August 1981, well after the dispute had arisen between the Parties concerning sovereignty over Pulau Sipadan and Pulau Ligitan.

6.16 From 1970 to the present, Indonesia has licensed other offshore blocks east of Kalimantan to companies such as BP, Shell and ARCO, but due to the unprospective nature of the area along the 4° 10' N latitude these blocks fell south of the area of concern in the present case. Nonetheless, it is clear from the JAPEX/Total licence that Indonesia considered that its jurisdictional rights extended up to the 4° 10' N line and that Malaysia did not object.

---

[5] A copy of the Production Sharing Agreement is attached at Annex 129, Vol. 4.

B. Malaysia's Offshore Oil Concessions in the Area

6.17 Malaysia's petroleum activities in the area commenced on 16 July 1964 with the signature of a concession agreement with the Japanese company, Sabah Teiseki Oil Company ("Teiseki")[6]. The initial concession area was limited to an onshore block lying to the north of the 1891 boundary and hence of limited relevance to the present dispute.

6.18 In 1968, the Malaysian Ministry of Lands and Mines published its 1967 Annual Report on geological surveying work that was being carried out in the Borneo region of the country[7]. The Report referred to the fact that Teiseki already held an onshore oil prospecting licence over 137 square miles in the Sebatik area. This was a reference to the original 1964 concession agreement. The Report went on to state that:

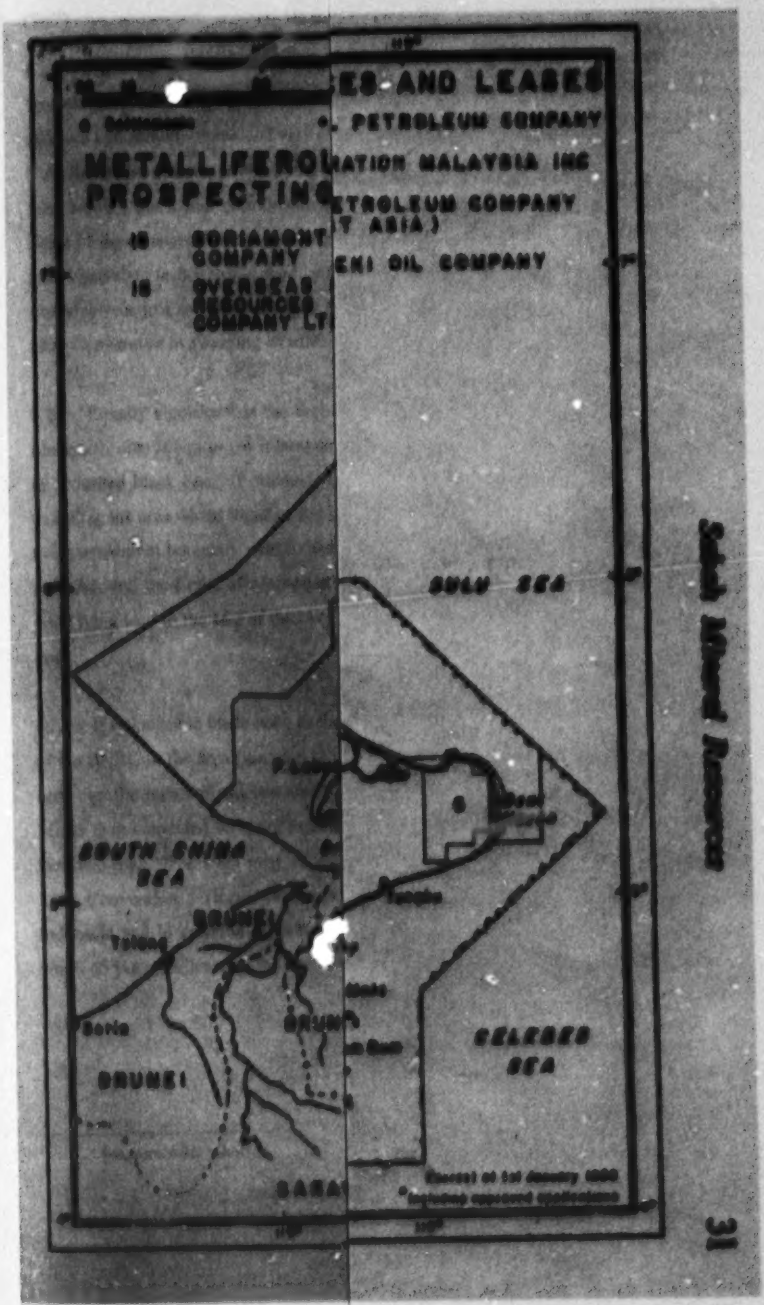
> "...during the year an application by the Company for a further 7,346 square miles covering much of the Dent and Semporna Peninsulas and adjacent marine areas was approved (13 and 14 in fig. 8)"[8].

6.19 The Report contained an official map of Malaysia's concession areas in Sabah which appeared as Figure 8 in the Report. A copy of this map is in the Map Atlas as Map No. 16. For ease of reference, the map has been reproduced as Map 6.2 facing this page.

6.20 Appearing as it did in an official publication of the Malaysian Ministry of Lands and Mines, the map is of particular significance. As can be seen, the limits of the various oil prospecting licenses granted by Malaysia were outlined in red on the map. Areas Nos. 12-14 were listed as having been granted to Teiseki. Area 12 corresponded to the original 1964 onshore Teiseki concession north of Sebatik. Areas 13 and 14 covered, respectively, the onshore Dent/Semporna block and the offshore marine block.

---

6 The coordinates of Teiseki's concession areas are attached as Annex 131, Vol. 4.
7 A copy of the relevant extract from the 1967 Annual Report is attached as Annex 130, Vol. 4.
8 *Ibid.*, at p. 30.


ES AND LEASES
PETROLEUM COMPANY
METALLIFERO
PROSPECTING
SULU SEA
SOUTH CHINA SEA
BRUNEI
SELEBES SEA
BRUNEI

Map 4.2

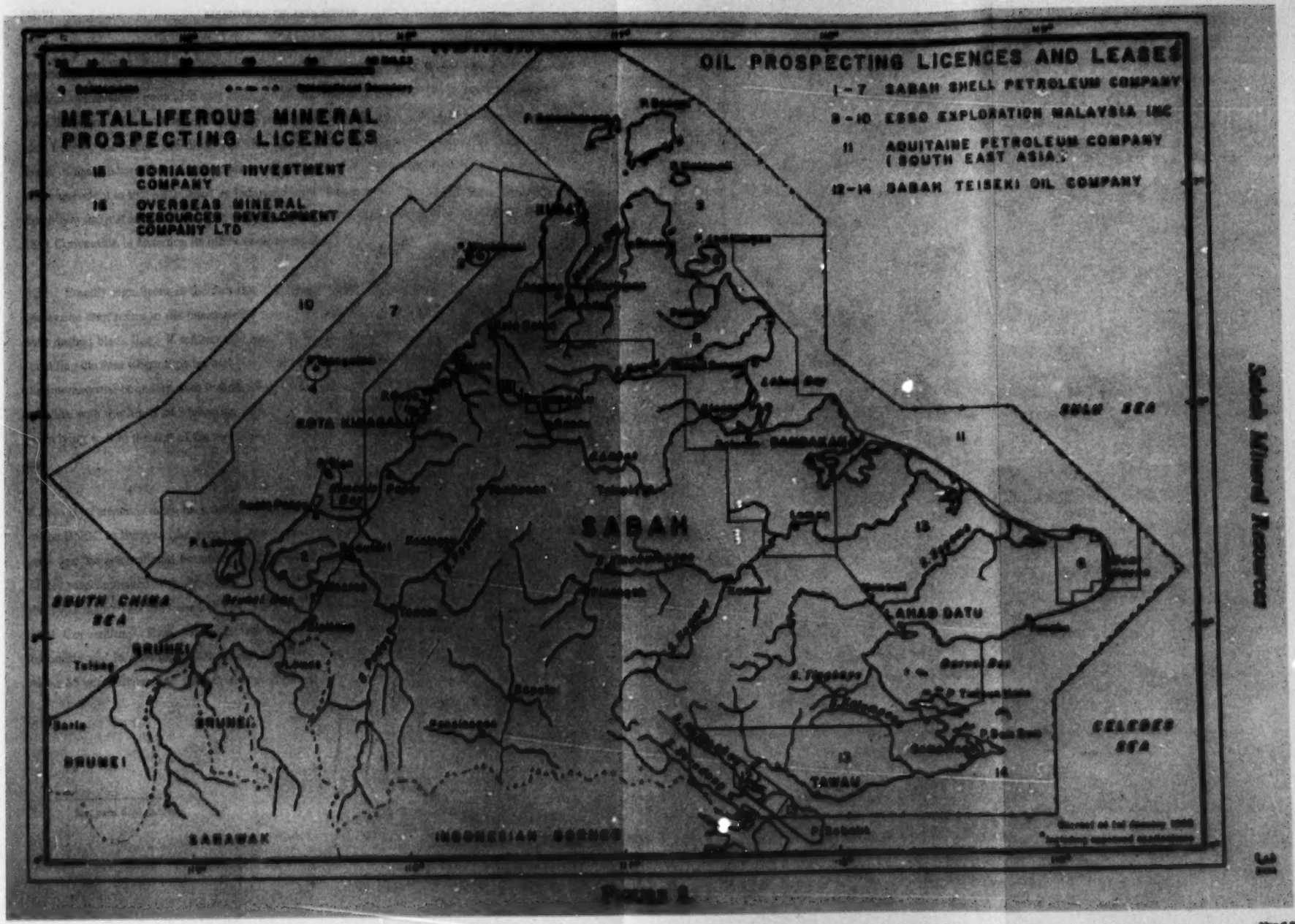

METALLIFEROUS MINERAL PROSPECTING LICENCES
15 SORIAMONT INVESTMENT COMPANY
16 OVERSEAS MINERAL RESOURCES DEVELOPMENT COMPANY LTD
OIL PROSPECTING LICENCES AND LEASES
1 - 7 SABAH SHELL PETROLEUM COMPANY
8 - 10 ESSO EXPLORATION MALAYSIA INC
11 AQUITAINE PETROLEUM COMPANY (SOUTH EAST ASIA)
12 - 14 SABAH TEISEKI OIL COMPANY
SABAH
SULU SEA
CELEBES SEA
SOUTH CHINA SEA
BRUNEI
SARAWAK
INDONESIAN BORNEO
KOTA KINABALU
SANDAKAN
LAHAD DATU
TAWAU

Figure 2.

6.21 It is clear from the map, which indicates at the bottom right that license areas are "correct of 1st January 1968 including approved applications", that Block No. 14 - the offshore concession - coincided very closely with the extension of the 4° 10' N line of latitude from the island of Sebatik to a point lying well eastward of Sipadan and Ligitan. As will be seen below[9], the actual coordinates of this block show that Malaysia limited the southern limits of the offshore Teiseki concession to the 4° 10' 30" N latitude, thus creating a "buffer" zone equivalent to that established by Indonesia in its licence to JAPEX. It was thus apparent that Malaysia, just as Indonesia, fully respected the 4° 10' N line of latitude established by the 1891 Convention in awarding its offshore oil contracts.

6.22 Equally significant is the fact that the legend appearing in the top left corner of the Malaysian map refers to the international boundaries of Sabah as being depicted on the map by a dashed black line. If reference is made to the area lying east of the island of Sebatik, including the area where Sipadan and Ligitan are located, it will be seen that Malaysia showed the international boundary with Indonesia as corresponding to the 1891 line extending out to sea. As with the limits of Malaysian Block No. 14, the international boundary extends to a point lying well to the east of the two islands leaving the islands on the Indonesian side of the line.

6.23 If reference is made back to the 1903 Stanford map which depicted the offshore limits of the BNBC in the area (the map can be found facing page 119 of this Memorial), it will be seen that the international boundary depicted on the 1968 Malaysian Ministry of Lands and Mines map coincided with the limits of the BNBC's administrative boundaries appearing on the 1903 map. The 1903 map, in turn, reflected the agreement that had been reached in the 1891 Convention. Thus, Malaysia's position in depicting its international boundary with Indonesia and in granting oil concessions in 1968 was entirely consistent with the BNBC's views 65 years earlier as to the extent of its jurisdiction.

---

[9] See, para. 6.26, below.

6.24 It is thus apparent that as of January 1968 – in other words, one year before the dispute emerged between the Parties - the Malaysian Government was clearly of the view that the limit of its jurisdiction vis-à-vis Indonesia in the area in which Sipadan and Ligitan are located corresponded to the 4° 10′ N parallel. There were no disclaimers on the map.

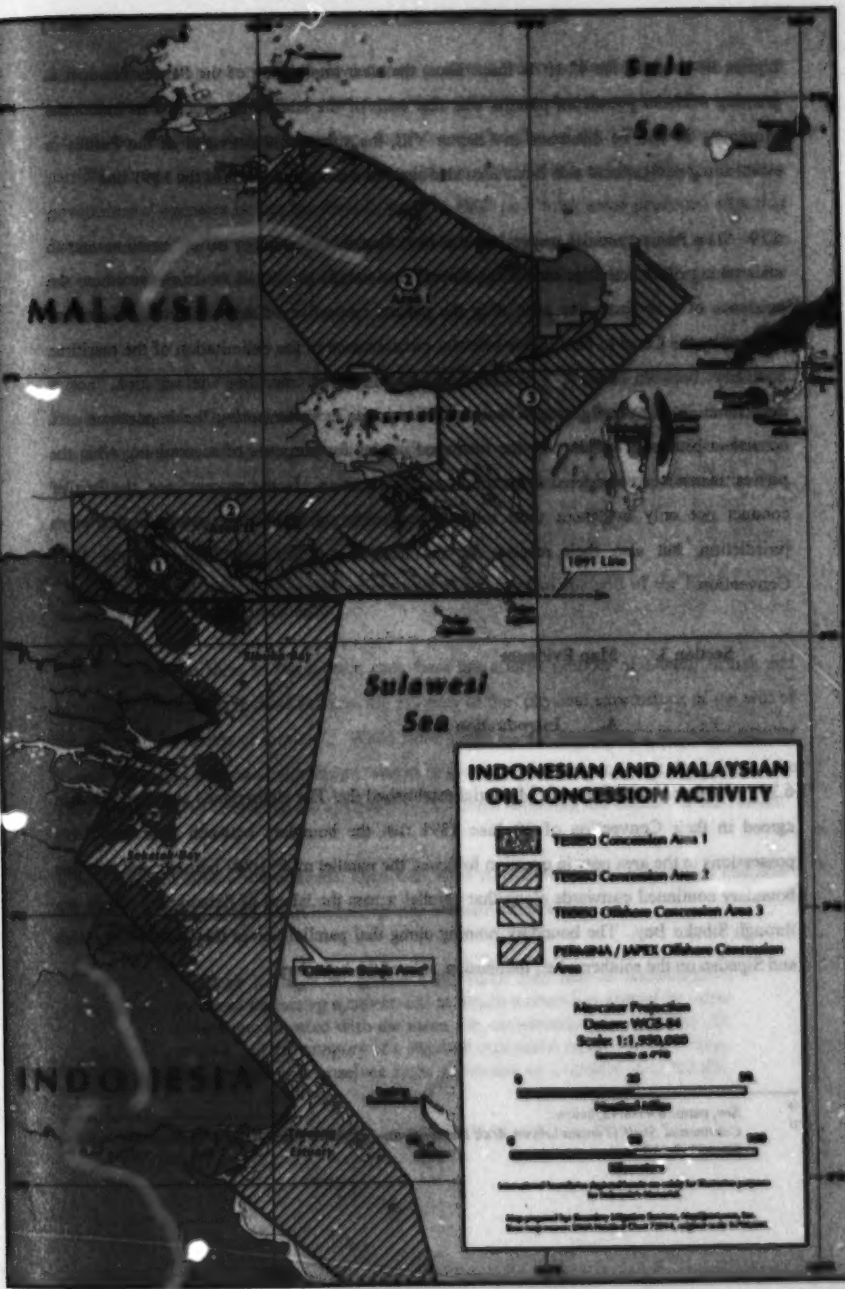
6.25 While the Teiseki offshore licence application appears to have been approved by the Malaysian authorities by 1 January 1968, the actual date of signature of the agreement was 1 July 1968. This can be seen from the details of the concession furnished as Annex 131 to this Memorial.

6.26 The area covered by the offshore Teiseki concession is depicted on Map 6.3. The southern limits of the concession area were fixed by a line connecting two points - Point 7 and Point 7a - east of the Island of Sebatik. As the concession document makes clear, this line tracked the 4° 10′ 30″ N line of latitude. Just as Indonesia had limited the northern extent of its 1966 permit to JAPEX to a line of latitude falling 30 seconds of latitude below the 4° 10′ N line, so also did Malaysia limit the southern extent of its own concession to Teiseki to a line of latitude falling 30 seconds above, or to the north of, the 4° 10′ N line.

6.27 According to the information available to Indonesia, the Teiseki concession was terminated in 1978, ten years after it had been granted, and nine years after the dispute first emerged between the Parties over the ownership of Sipadan and Ligitan. Just as Malaysia never protested Indonesia's license to JAPEX, so also Indonesia had no reason to protest the Teiseki concession. At no time during this period did Malaysia grant any concessions extending south of the 4° 10′ N line of latitude.

C. Conclusion

6.28 It is abundantly clear that, in granting offshore oil licenses, both Indonesia and Malaysia respected the 4° 10′ N line of latitude established by the 1891 Convention as the limit of their respective activities. As noted in Chapter II, both Pulau Sipadan and Pulau


Sulu Sea
MALAYSIA
1991 Line
Sulawesi Sea
INDONESIA
INDONESIAN AND MALAYSIAN OIL CONCESSION ACTIVITY
Mercator Projection
Datum: WGS-84

Map 6.3

Ligitan lie south of the 4° 10′ N line. Thus, the clear implication of the Parties' conduct in granting offshore petroleum permits was that each of the islands appertained to Indonesia. Moreover, as will be discussed in Chapter VIII, the subsequent activities of the Parties in establishing navigational aids in the area also showed a mutual respect for the 1891 line[10].

6.29 The Parties' mutual respect for the 1891 line in the grant of oil concessions and in undertaking other activities recalls the Court's decision in the *Libya-Tunisia* case where the existence of a *de facto* line separating the parties' respective offshore oil concessions was deemed by the Court to be a highly relevant circumstance in the delimitation of the maritime boundary between them[11]. While that case involved maritime delimitation, not a determination of sovereignty, the case is still apposite in underscoring the importance of a consistent pattern of conduct by the interested parties for purposes of ascertaining what the parties themselves considered to be the boundary situation. In the present case, the Parties' conduct not only evidences their mutual recognition of a line separating each Party's jurisdiction, but also their respect for the treaty-based line established by the 1891 Convention.

Section 3. Map Evidence

A. Introduction

6.30 Chapter V of Indonesia's Memorial established that The Netherlands and Great Britain agreed in their Convention of 20 June 1891 that the boundary between their respective possessions in the area now in question followed the parallel of 4° 10′ N latitude, and that this boundary continued eastwards along that parallel across the island of Sebatik and out to sea through Sibuko Bay. The boundary running along that parallel leaves the islands of Ligitan and Sipadan on the southern, i.e., Indonesian, side of the boundary.

---

10 See, paras. 8.41-8.45, below.

11 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at p. 84, paras. 117-118.

6.31 This Section reviews the relevant map evidence, from both official and non-official sources, covering the period from 1881 to the early 1970s just after the dispute had emerged. As will be seen, this evidence confirms the foregoing reading of the 1891 Convention. In particular, maps prepared by British sources on behalf of the BNBC, and by official Malaysian governmental agencies before the dispute arose in 1969 (and even some produced after that date), are consistent in depicting the boundary line as extending offshore to the north of the known locations of the islands of Ligitan and Sipadan, thus leaving them on what is now the Indonesian side of the line.

6.32 The legal relevance of maps has been discussed in a number of judicial precedents. For example, the Chamber of the Court in the *Frontier Dispute* observed that the "actual weight to be attributed to maps as evidence depends on a large number of considerations"[12]. While the Chamber noted that maps do not, in and of themselves, constitute a territorial title, maps may still have such legal force where they:

> "fall into the category of physical expressions of the will of the State or States concerned"[13].

6.33 As will be seen, in the present case there are a large number of Dutch, British and Malaysian maps which indeed fall into the category of the "physical expressions of the will of the State or the States concerned". While these maps do not constitute a territorial title by themselves, they command significant weight in the light of their consistent depiction of the 1891 Treaty line as separating the territorial possessions, including the islands, of the Parties.

6.34 Even in other circumstances, maps may have corroborative or confirmatory character. Thus, the Chamber of the Court in the *Frontier Dispute* stated that:

> "...maps ... have no greater legal value than that of corroborative evidence endorsing a conclusion at which a court has arrived by other means unconnected with the maps. In consequence, except when the maps are in the category of a physical expression of the will of a State, they cannot in themselves alone be treated as evidence of a frontier,

---

[12] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 582, para. 55.
[13] *Ibid.*, para. 54.

> since in that event they would form an irrebutable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind..."[14].

6.35 Moreover, the Arbitral Tribunal in the *Eritrea-Yemen* Arbitration adopted a similar position stating that:

> "...since the Tribunal has arrived at its legal conclusions about the status of the Islands on the basis of the diplomatic record and agreements entered into between 1923 and 1939, the map evidence – whilst supportive of and consistent with the conclusions reached – is not itself determinative. Were there no other evidence in the record concerning the attitude and intentions of Italy, this evidence would be of greater importance"[15].

6.36 Other decisions of international judicial and arbitral tribunals have acknowledged that maps can be relevant in a number of ways to questions of boundary delimitation even where the boundary itself is determined by the terms of a particular treaty. The question of the relative weight to be given to a map and a treaty text is, as Judge Fitzmaurice noted in his Separate Opinion in the *Temple* case, "one that must always depend on the interpretation of the treaty settlement, considered as a whole, in the light of the circumstances in which it was arrived at"[16]. The diplomatic circumstances which led to the settlement embodied in the 1891 Convention have been explained in Chapter V of this Memorial. In the context of the present dispute maps are, against that background, relevant in the following main ways:

(i) as a physical expression of the parties' intentions and expectations in entering into the negotiations leading to the boundary Convention concluded by them on 20 June 1891;

(ii) as an official and contemporaneous physical expression of their interpretation of the terms of that Convention;

---

[14] *Ibid.*, at p. 583, para. 56.

[15] *Eritrea/Yemen Arbitration*, Award of the Arbitral Tribunal in the First Stage of the Proceedings, 9 October 1998, p. 96, para. 375.

[16] *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, Separate Opinion of Sir Gerald Fitzmaurice, pp. 65-66.

(iii) as evidence of their attitudes in the years immediately following the conclusion of the Convention as to its territorial effect;

(iv) as evidence of general repute as to the territorial effects of the conclusion of the Convention;

(v) as admissions against interest by States publishing official maps, and thus as evidence of its assumed will.

6.37 Given that no map was included in the 1891 Convention as an integral part of the Convention, it is the terms of the Convention which determine the delimitation of the boundary agreed in it and thus title to territory on either side of the agreed boundary line. Maps, generally speaking, can throw light on the meaning to be attributed to a treaty's terms, and can confirm the meaning already apparent from its terms. Where, as in the present case, they point consistently in the same direction as that which follows from the terms of the 1891 Convention[17], they (to borrow from the Permanent Court's decision in the *Jaworzina* case: see, para. 6.51, below) "confirm in a singularly convincing manner" the conclusions drawn from the language of the Convention.

6.38 A preliminary point needs to be made concerning the depiction on maps of the islands of Ligitan and Sipadan. As already noted in Chapter II, these two islands are very small. Although Ligitan and Sipadan are shown on some maps, it is not to be expected that geographical features of the size of these small islands would be shown on all maps, particularly small scale maps. Nevertheless, the islands exist, and have at all material times existed at geographical locations whose coordinates are known. The cartographic evidence confirms that the boundary line between Indonesian and Malaysian possessions as established by the 1891 Convention follows the 4° 10′ N latitude. That is sufficient cartographic support for the conclusion that Ligitan and Sipadan are under the sovereignty of the State (i.e., formerly The Netherlands, and now Indonesia) whose possessions lie on that side of the line, even if individual small islands are not shown on some particular map.

---

[17] At least up to the beginning of the present dispute in 1969, and even thereafter.

B. Maps Relied Upon by the Parties in the Context of the 1891 Convention

6.39 It is well established that maps can be instrumental in revealing the intention of the parties. Although maps produced by the parties in connection with a boundary treaty do not have the same character as maps forming an integral part of such a treaty, they are nevertheless highly relevant in illustrating what the parties to a boundary treaty had in mind when negotiating their boundary line.

6.40 In the present case, the cartographic evidence of both Great Britain and The Netherlands relating to the negotiation of the 1891 Convention shows that the parties' common intent was to extend offshore the dividing line of their territorial possessions in Borneo, thus including the disputed islands within the scope of their territorial settlement.

(i) Dutch and British Cartographic Evidence Prior to the 1891 Convention

6.41 Dutch cartography prior to the signature of the 1891 Convention shows that The Netherlands viewed the islands of Ligitan and Sipadan as being subject to its sovereignty. For instance, in 1881, the Dutch scholar De Sturler published a doctoral dissertation entitled *Het Grondgebied van Nederlandsch Oost-Indie in Verband met de Tractaten met Spanje, Engeland en Portugal* ("The Territory of the Netherlands East Indies in Connection with the Treaties with Spain, England and Portugal"). This publication contains a map of the Netherlands East Indies (Map No. 1 in the Map Atlas) indicating sovereignty by colour coding and showing conventional boundaries drawn into the sea. The Netherlands East Indies are coloured in brown while the territories designated as Spanish are coloured green; in addition, a green line encircles the Philippine Archipelago and a brown line encircles the Dutch possessions.

6.42 It is noteworthy that this map shows Dutch territory on the mainland extending well to the north of the Sibuko river and running along part of the coast to the north of, and eastwards beyond, the location of the island of Sebatik. Although the islands of Ligitan and Sipadan do not appear on the map because of their small size, the location of the boundary, running eastwards from the Dutch mainland boundary well north of the Sibuko river and Sebatik, makes it clear that the disputed islands were regarded by the Dutch as being part of their possessions. Moreover, the green line encircling Spanish possessions equally clearly shows that the disputed islands were not part of any Spanish possessions.

6.43 Subsequently, British maps in the period leading up to the 1891 Convention provide evidence of Britain's negotiating position concerning the location of the boundary line. In particular, British maps are consistent with Dutch maps in indicating that the parties did not simply intend to fix their boundary on the mainland of Borneo, but also that they intended to attribute sovereignty over their respective possessions offshore. In this connection it is to be noted that several of the maps to be referred to in the following paragraphs were published by the Edward Stanford company in London. Stanford was a highly regarded cartographic publisher of the period, and the foremost cartographic establishment in Great Britain at the time, with a world-wide reputation for producing authoritative maps. Of particular relevance in the present context is the fact that it is apparent from a number of sources that Stanford was in effect used by the British North Borneo Company as its official cartographer (see, paras. 6.54-6.58, below). This lends the Stanford maps of the region now in question a special degree of authority.

6.44 Of particular interest in this regard are two extracts from a map of British North Borneo published by Edward Stanford for the BNBC in 1888. The first of these maps, which appears as Map No. 3 in the Map Atlas, marks with a yellow line the "Approximate Boundary of N. Borneo Co. as marked on Stanford's map of 1888", and with a red line the "Northern Boundary of Dutch Possessions as claimed on Dutch Government map of 1885" (showing

Dutch territory extending well to the north of the Sibuko river and along the coast north and east of Sebatik island). In addition, a manuscript dotted line coloured in green was added to show the "Proposed line dividing the territory of the British North Borneo Co. from that of the Netherlands Govt". This line runs across the mainland of Borneo just above the Simengaris river, continues at sea between the islands of Sebatik and Nanoekhan and extends across Sibuko Bay[18].

6.45 It should be noted that this map purported to illustrate a compromise position advanced by the BNBC during the British Government's negotiations with the Dutch Government for what was to become the 1891 Convention. As such, it must be viewed in the context of these negotiations. As described in Chapter V, above, the diplomatic record indicates that Great Britain initially preferred not to divide Sebatik island. This explains why the proposed boundary line drawn on this map takes a southerly direction between Sebatik and Nanoekhan islands. This does not detract from the fact that the map provides compelling evidence that the British already envisaged that the line dividing their possessions from the Dutch would continue offshore.

(ii) The Map Attached to the 1891 Dutch Explanatory Memorandum

6.46 As explained in Chapter V, the Dutch Government prepared an Explanatory Memorandum describing the terms of the 1891 Convention to be used in the course of parliamentary discussions relating to the ratification of the Convention[19]. Attached to the Memorandum was a map prepared by the Dutch Government to illustrate the boundary line dividing Dutch and British possessions in Borneo resulting from the 1891 Convention. This map (the "Explanatory Memorandum Map") has been reproduced as Map 5.2 facing page 90; a copy of the map also appears as No. 5 in the Map Atlas. This map was based on a sketch drawn up at the Ministry of the Colonies and sent to the Ministry of Foreign Affairs.

---

[18] On another copy of the same map, Map No. 4 in the Map Atlas, other manuscript lines, all extending offshore, were added to depict different proposals.

[19] See, paras. 5.46-5.49, above.

6.47 The Explanatory Memorandum Map shows four different lines: a blue line indicating the boundary originally claimed by the Dutch Government, a yellow line indicating the boundary claimed by the BNBC, a green line showing the line proposed by the British Government and, finally, a red line marking the boundary agreed upon in the Convention. The red line shows the agreed boundary line as following the parallel of latitude 4° 10′ N starting at the eastern coast of Borneo, crossing the waters at the mouth of the estuary/delta of the River Sibuko and the island of Sebatik, and then continuing eastwards beyond that island and out to sea in a direction running to the north of Ligitan and Sipadan. As shown in Chapter V, it thus clearly shows that the Dutch Government understood at the time that those two islands fell on the Dutch side of the boundary line agreed in the Convention. It also shows that the Dutch Government understood the Convention as delimiting the extent of the parties' territorial sovereignty over their possessions in the eastern part of Borneo not only on the mainland but also offshore.

6.48 As explained in Chapter V (paras. 5.51, *et seq.*), the Explanatory Memorandum Map was publicly available at the time, and was, at a high level, officially brought to the knowledge of the British Government in the context of the process leading to the entry into force of the Convention. No British protest at the map's content, nor any British dissent from it, is recorded. It thus represents the parties' contemporaneous agreed interpretation of Article IV of the Convention, adopted as part of the treaty settlement of their Borneo boundaries.

6.49 Both the jurisprudence and doctrine consistently acknowledge that maps have a significant probative value when they represent evidence of the parties' will or intent. The classic example is that of maps annexed to a treaty or maps on which the parties have relied in drafting a treaty. In the *Jaworzina* case, the Permanent Court had to consider the significance of maps attached to, but not made an integral part of, the decision of the Conference of Ambassadors[20]. The Court noted that maps can be particularly helpful when the terms of a

[20] *Jaworzina, Advisory Opinion, 1923, P.C.I.J. Series B, No. 8.*

treaty are unclear. In stating that the text of the treaty should prevail over a map, the Permanent Court observed that in the case before it there was no conflict between the map and the legal instrument to which it was attached. As the Court went on to say:

> "It is true that the maps and their tables of explanatory signs cannot be regarded as conclusive proof, independently of the text of the treaties and decisions; but in the present case they confirm in a singularly convincing manner the conclusions drawn from the documents and from a legal analysis of them; and they are certainly not contradicted by any document"[21].

6.50 In the present case, as in the *Jaworzina* case, there is no conflict between the 1891 Convention and the maps prepared in the course of the conclusion of that Convention. The words of the Permanent Court are thus particularly apposite.

6.51 In subsequent decisions the Court has continued to affirm that official maps are relevant evidence of a party's views at the time. In the *Minquiers and Ecrehos* case, for example, French official cartographic evidence transmitted to the British Foreign Office in the course of negotiations showing the disputed islands within British territory were considered as evidence of the French view at the time[22]. In the *Sovereignty over Certain Frontier Land* case, a military map drafted by Belgium in which the disputed plots were shown as Belgian territory was also relied upon by the Court as evidence in favour of the position of Belgium[23]. In the *Territorial Dispute* case between Libya and Chad, the Court held that the map annexed to the French *Livre Jaune* - a document prepared in view of the ratification of the 1899 Franco-British Additional Declaration was an authoritative interpretation of that Declaration[24].

---

21 *Ibid.*, p. 33.
22 *Minquiers and Ecrehos, Judgment, I.C.J. Reports 1953*, p. 47, at p. 71.
23 *Sovereignty Over Certain Frontier Land, Judgment, I.C.J. Reports 1959*, p. 209, at p. 227.
24 *Territorial Dispute, Judgment, I.C.J. Reports 1994*, p. 5, at pp. 30-31.

C. Maps Reflecting the Offshore Extension of the Boundary During the Early Colonial Period

6.52 Further confirmation that the British viewed the 1891 line as extending offshore leaving Pulau Ligitan and Pulau Sipadan on the Dutch and, subsequently, Indonesian side of the boundary is provided by an official map entitled *Borneo* published by Stanford in 1903. As can be seen from Map 6.4 facing page 119, the legend of the map explains that the provinces of the BNBC are separated by red lines on the map. Examining the reproduction of the relevant portion of the map, the boundaries of the BNBC's provinces can be seen to extend seaward, thus including various offshore islands[25]. In particular, the southern offshore boundary of the Elphinstone province continues into the sea and coincides with the course of the 1891 line, leaving the islands of Pulau Ligitan and Pulau Sipadan to the south – i.e., on the Indonesian side – of the boundary. While Ligitan is too small to be separately depicted on the map, Sipadan is clearly shown to lie outside of the BNBC's territory.

6.53 The 1903 Stanford map is direct evidence of what the BNBC considered to be the limits of its territory following the conclusion of the 1891 Convention. Stanford's status as effectively the official cartographer for the BNBC underscores the important evidentiary value of the map.

6.54 As discussed above, in 1888 Stanford had already published two maps of the BNBC's territory specifically for the company. These maps were used by the British in formulating their positions advanced during the negotiation of the 1891 Convention.

6.55 Following the conclusion of the 1891 Convention, British archival sources show that Stanford's Geographical Establishment continued to act as the official cartographer of the BNBC. On 26 April 1892, for example, the Governor's Office of the BNBC in Sandakhan sent correspondence to London enclosing two sets of plans regarding the mapping of portions

---

[25] A copy of the 1903 Stanford map with an enlargement of the relevant area is also attached as Map No. 9 in the Map Atlas.

of the BNBC with the request that these plans be forwarded to Stanford for their maps[26]. On 8 July 1898, the BNBC's Commissioner of Land in Sandakhan sent further correspondence to London indicating the results of further surveys of the BNBC's territory. As the letter noted:

> "I hope these 3 tracings and map will be sent to Stanford to place the details on our Territorial Map"[27].

6.56 It follows that the BNBC looked to Stanford for the preparation of official maps of the Company's territory. The 1903 Stanford map thus represented the contemporaneous view of what the BNBC itself considered to be the limits of its territorial possessions. The map clearly shows that the BNBC recognised that the southern limits of its territory east of the island of Sebatik coincided with the prolongation of the 4° 10′ N parallel of latitude established by the 1891 Convention to a point lying well to the east of Pulau Ligitan and Pulau Sipadan. Both islands were clearly recognised as belonging to Dutch Borneo.

D. General Repute: Third Party Maps Showing the Offshore Extension of the Boundary Line

6.57 In the *Frontier Dispute* a Chamber of the Court, while treating maps with considerable caution and emphasising that in principle they had only an essentially auxiliary and confirmatory role, acknowledged that a map produced by an authoritative and impartial body external to the parties in dispute would, in certain circumstances (e.g., where other evidence is lacking or is not sufficient to show an exact line), have a probative value which would become "decisive"[28].

6.58 The U.S. Library of Congress contains a number of maps which were filed by the United States in 1925 during the *Island of Palmas* arbitration between The Netherlands and the United States. A map entitled "East India Islands (Malaysia and Melanesia)" is a coloured

---

[26] Annex 87, Vol. 3.
[27] Annex 92, Vol. 3.
[28] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at p. 586; see, also, Jennings, Sir R., and Watts, Sir A., (eds.), *Oppenheim's International Law*, 9th ed., Longmans, London, 1992, p. 664.

Map 6.4

facsimile of Plate 116 contained in *The Century Atlas* of 1897. This map is reproduced as Map No. 7 in the Map Atlas. According to the U.S. Memorandum in the *Island of Palmas* case, *The Century Atlas* was part of *The Century Dictionary* which itself was described as, "a monumental American publication, a dictionary expanded to encyclopedic proportions. The most competent scholars contributed to its preparation"[29].

6.59 The map identifies the Dutch, British, Spanish and Portuguese possessions by means of colour coding. In particular, a broken black line drawn running across the island of Sebatik into St. Lucia Bay and continuing south-east of Mindanao Island is designated "Boundary of Dutch Possessions", and a further broken black line running north of that line to the seaward of British North Borneo is marked "British" and "Spanish" on the separate sides of the line. Although the coordinates of these lines are not precisely defined, this map provides evidence that the United States viewed the limits of the Dutch and British possessions as extending out to sea eastwards from Sebatik, and the limits of Spanish possessions at sea being well to the east of the locations of Sipadan and Ligitan.

E. Maps as Admissions Against Interest

6.60 Maps issued by an official governmental department of a State or recognised by a government have a high degree of probative value, particularly when they constitute admissions against interest or depict a position inconsistent with a position subsequently advanced by that State. This is particularly important in the present case where both British and Malaysian maps depict the disputed islands as falling outside of the territory of the BNBC and, subsequently, Malaysia.

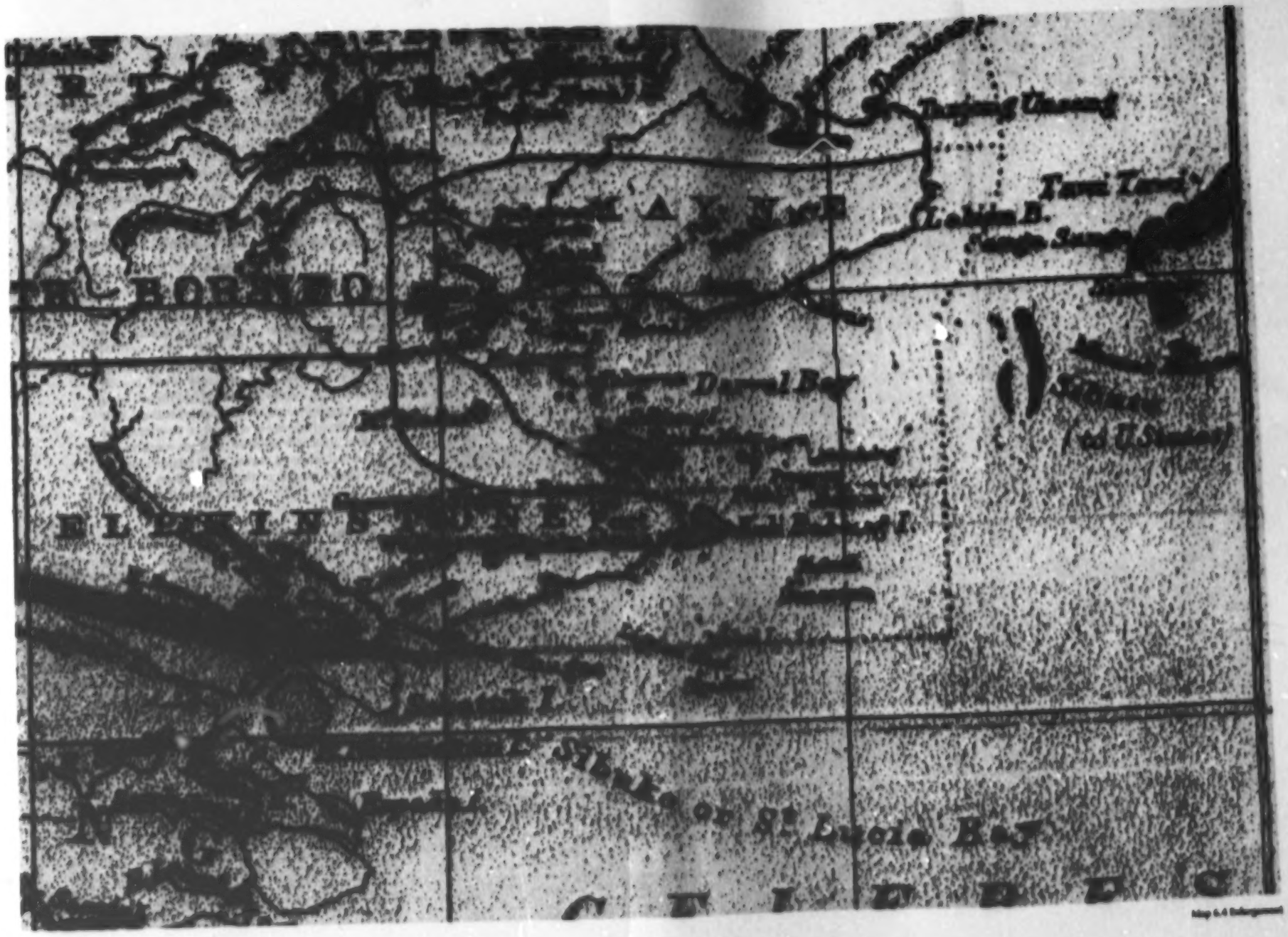
6.61 In the *Island of Palmas* case, Judge Huber indicated a preference for such official maps, especially when they, "do not assert the sovereignty of the country of which the Government has caused them to be issued"[30].

---

[29] See, *Island of Palmas* case, United States Memorandum, p. 39.

[30] *Island of Palmas* Arbitration, P.C.A. Award of 4 April 1928, *UNRIAA*, Vol. II, p.852.

Map 4.4 Enlargement



6.62 Further authority on point is provided by the *Eritrea/Yemen* arbitration where Eritrea advanced the argument that Italy, from which Ethiopia and subsequently Eritrea ultimately inherited sovereignty, had claimed sovereignty over the disputed islands in the case during the period immediately preceding the Second World War. Yemen introduced into evidence official maps issued by the Italian Government during the relevant period showing that Italy in fact had never considered itself sovereign over the disputed islands and that official Italian cartography did not depict the disputed islands as Italian. The Tribunal stressed the importance of the map evidence as admissions against interest in this respect in upholding Yemen's contentions. In the Tribunal's words:

> "To the extent that these may be viewed as admissions against interest from official Italian sources, which are not controverted by Eritrean evidence, they have relevance to the Eritrean claim that Italy considered herself sovereign over the Islands at the outbreak of the Second World War. The best interpretation of this evidence appears to be that official Italian cartography did not wish formally to portray the Islands as being under Italian sovereignty in the inter-war period – and even went so far as to assign the Islands to Yemen. On balance, the evidence seems to establish that Italy, in the interbellum period, did not consider the Islands to be under Italian sovereignty or at least does not establish that Italy in that period did consider the Islands to be under Italian sovereignty"[31].

(i) British Maps Showing Ligitan and Sipadan Islands as Part of the Dutch Possessions

6.63 The importance of the 1903 Stanford map showing the southern boundary of the BNBC as limited by the extension of the 4° 10′ N line of latitude drawn seaward from Sebatik has been discussed in paras. 6.52-6.56, above. A number of other official maps from British sources also show the islands of Ligitan and Sipadan within the limits of Dutch possessions.

---

31 *Eritrea/Yemen Arbitration*, Award of the Arbitral Tribunal in the First Stage of the Proceedings, 9 October 1998, p. 96, para. 374.

6.64 One interesting example is provided by a map entitled "Colony of North Borneo" which was published in the *Colonial Reports of North Borneo* of 1953[32]. This map shows the district boundaries of the colony of North Borneo as well as the boundary of Dutch and British possessions. The latter is represented by a dotted line running across the island of Sebatik at approximately the 4°10′ N latitude. This line stops on the east coast of Sebatik. However, another dotted line marking the boundary of two districts of the British colony - presumably Lahad Datu and Tawau – continues southwards out to sea and stops at the 4° 10′ parallel just north of the location where the disputed islands lie. Although the two lines do not meet, the fact that the British district boundary stops at approximately the 4°10′ N latitude is an indication that the map was intended to reflect the offshore possessions of the colony of North Borneo as extending only as far south as the 1891 line, so leaving the islands of Ligitan and Sipadan within Dutch territory. Certainly, the map gives no indication of there being any islands at the locations of Sipadan and Ligitan forming part of the British colony.

6.65 A further interesting map is a 1973 Tactical Planning Chart (No. L-11C) produced by the British Ministry of Defence in 1973. A copy of this map is reproduced as Map No. 19 in the Map Atlas. This map also depicts the 1891 line extending eastwards from the island of Sebatik in conformity with the 1891 Convention.

(ii) Malaysian Maps Showing the Area Where Ligitan and Sipadan Are Located As Falling Outside of Malaysia's Possessions

6.66 Of particular significance is the fact that, following Malaysia's independence in 1963 and even after the dispute arose in 1969, Malaysia published a series of maps depicting the offshore extension of the line established by the 1891 Convention which allocates the disputed islands to Indonesia. Copies of such maps may be found in the Map Atlas as Nos. 11, 12, 13, 14, 16, 18, 20 and 21.

---

[32] Map No. 10 in the Map Atlas.

6.67 International precedents have consistently held that the publication of a map is part of State conduct and when a State has depicted its territory as having a certain extent, it cannot, subsequently and for self-serving purposes, contradict its own conduct by a claim in excess of what is shown on its own maps.

6.68 Moreover, maps emanating from the parties as "official" maps prepared by government agencies, although not forming part of a treaty, may be taken as reflecting the considered view of that party as to its territorial claims. Accordingly, when a party publishes a map or acquiesces in its use as a description of a boundary, that party may be precluded from challenging the map.

6.69 In the *Beagle Channel* case, the Tribunal has made the point that, in a boundary litigation, maps published by one State which support the claim of another State are entitled to a greater weight than maps published to buttress its own claim. This principle has been described by Hyde as follows:

> "The cartographer officially employed to portray the political limits of a particular State is usually cognizant of their scope. His map may, therefore, be taken as the embodiment of the full extent of its territorial pretensions. Thus a map published by a State, or under its auspices, or purporting to reflect its position, and which it has been disposed to utilize as a means of publicly revealing its position, may be fairly accepted as establishing that when issued it represented what that State deemed the limits of its domain. Moreover, when a series of maps of such a kind, appearing within a few decades, tell the same story and depict substantially the same limits, the conclusion is justified that they mark a frontier beyond which the interested State cannot go without some fresh and definite and respectable process of acquisition, such as one embodied in a treaty of accession. Thus in the course of a boundary arbitration the most obvious function of an official map issued under the auspices of a particular litigant may be that of holding that litigant in leash"[33].

[33] Hyde, C.C., *International Law, Chiefly as Interpreted and Applied by the United States* (3 Vols.), (2nd rev. ed., 1947), p. 496.

As shall be seen below, this reasoning is particularly apposite to the present dispute.

6.70 Of particular note is a map published in 1964 by the Survey Department of the British Ministry of Defence for the Director of National Mapping of Mala ia[34]. The map is entitled *Pulau Sebatik* and shows the international boundary between Indonesia and Malaysia running across the island of Sebatik at the 4°10′ N latitude and extending east into the sea. The map, prepared as it was for the Malaysian Government Mapping Agency, confirms that Malaysia was of the view that the 4° 10′ N line east of Sebatik constituted the southern limit of its sovereign possessions.

6.71 Also significant is a map published in 1965 by the Survey Department of the British Ministry of Defence for the Malaysian Director of National Mapping[35]. The map is entitled *Tawau* and marks the international boundary with Indonesia as running across Sebatik island at 4°10′ N, with a line continuing in due easterly direction across Sibuko Bay along the same parallel. Although the islands of Ligitan and Sipadan do not appear on the map, their position in relation to the course of the line is such that, were they to be plotted on the map, they would be shown to the south of the line and thus as Indonesian possessions.

6.72 A number of other Malaysian maps issued by the Directorate of National Mapping show the offshore extension of the boundary line between Indonesia and Malaysia, cutting across Sebatik island and running into Sibuko Bay along the 4° 10′ N latitude in conformity with the 1891 Convention. These include a map entitled *Malaysia Timor Sabah* compiled by the Department of Lands and Surveys of Sabah in 1964 and printed and published by the Malaysian Directorate of National Mapping in 1966. This map also shows the District boundary between Semporna and Tawau extending southwards into the sea, but no further south than the 4°10′N parallel. Two subsequent maps bearing the same title issued by the Malaysian Directorate of National Mapping in 1967 and 1972 depict the same situation[36].

---

[34] Map No. 11 in the Map Atlas.
[35] Map No. 13 in the Map Atlas.
[36] Maps No. 12, 14 and 18 in the Map Atlas.

6.73 As discussed in paras. 6.18-6.22, above, in 1968 Malaysia's Ministry of Lands and Mines published an official map which depicted both the offshore limits of Malaysia's oil concessions and the international boundary with Indonesia in the relevant area[37]. Once again, that boundary coincided with the 1891 line as extended out to sea, thus leaving the disputed islands unquestionably on Indonesia's side of the boundary.

6.74 Thus, well before the dispute over Pulau Ligitan and Pulau Sipadan emerged between the Parties in 1969, Malaysian official cartography consistently depicted the extension of the 4° 10′ N line of latitude out to sea as the southern limit of Malaysia's territorial possessions in the area. These maps are fully consistent with the BNBC's earlier portrayal of its territorial limits as depicted, *inter alia*, in the 1903 Stanford map, and with the 1891 Convention itself.

6.75 In 1969, Indonesia and Malaysia delimited their continental shelf in the Strait of Malacca and the South China Sea. It was during the negotiation of this agreement that Malaysia first raised a claim to the disputed islands[38]. While the issue of sovereignty over Pulau Ligitan and Pulau Sipadan was reserved for further discussion, the Parties did attach a map to their 1969 continental shelf agreement which depicted a dashed line extending due east along the 4° 10′ N latitude from the island of Sebatik[39].

6.76 Even after the dispute arose in 1969, Malaysia continued to print and publish maps showing a boundary running along the 4°10′ N parallel of latitude and continuing seaward from Sebatik island. One such map was published in 1972[40]. Similarly, another Malaysian map of the State of Sabah, prepared and published by the Malaysian Department of Statistics in 1974 and entitled *Negeri Sabah, Population and Housing Census. Map Showing Distribution of Population*, depicts the international boundary between Indonesia and

---

37 Map 6.2 and Map No. 16 in the Map Atlas.
38 See, para. 8.10, below.
39 The 1969 negotiations are examined in detail at paras. 8.5-8.17, below.
40 This map appears as Map No. 18 in the Map Atlas.

Malaysia as lying at the 4°10′ N latitude across and beyond Sebatik Island, with a further dotted line continuing and extending that parallel offshore until the meridian of 119° E latitude[41]. Although the disputed islands are not specifically marked on the map, the course of the boundary line indicates that, were the islands of Ligitan and Sipadan to be plotted on the map, they would be found to lie on the Indonesian side of the boundary.

F. Conclusions

6.77 This review of the cartographic evidence dating back to the late 19th century is consistent and compelling. This impressive collection of maps, including British, Dutch and U.S. maps, confirms that the line resulting from the 1891 Convention extended offshore across Sebatik island into Sibuko Bay thus div ing the territorial possessions of the Parties. Pulau Ligitan and Pulau Sipadan both fall on Indonesia's side of the line. Following its independence in 1963, Malaysia's maps also consistently show an offshore line running at 4°10′ N Latitude into the sea, leaving the islands as part of Indonesia's territorial possessions. It was only in 197o well after the dispute had arisen, that Malaysia's maps begun to change in a self-serving fashion. This aspect of the case is taken up in Chapter VIII, below.

6.78 Since the dispute only began in 1969, none of the maps published before that year were prepared for purposes of the litigation which is now in progress: those maps are thus all, for the purposes of the present case, litigation-neutral, and constitute an objective representation of the territorial position as seen by those preparing them. Moreover, that representation is of remarkable consistency in showing the 1891 Convention line as extending eastwards and seawards from the island of Sebatik. As the Court of Arbitration in the *Beagle Channel Arbitration (Argentina v. Chile)* (1977) remarked:

> "Where there is a definite preponderance on the one side – particularly if it is a very marked preponderance – and while of course every map must be assessed on its own merits – the cumulative impact of a large number of maps, relevant for the particular case, that tell the same

[41] Map No. 20 in the Map Atlas.

> story – especially where some of them emanate from the opposite Party, or from third countries – cannot but be considerable, either as indications of general or at least widespread repute or belief, or else as confirmatory of conclusions reached, as in the present case, independently of the maps"[42].

6.79 That same Court of Arbitration also remarked upon the unreality of expecting there to be concordance between all maps relating to a disputed territory: what was required, it noted, was not concordance but preponderance[43]. A similar attitude was adopted more recently, by the Arbitration Tribunal in the *Eritrea/Yemen* case, when "on balance" it reached certain conclusions, including attaching weight to the fact that "by and large" official Italian maps were to a certain effect, that "the general trend" of maps relied on by one party was superior, and that "looked at in their totality" the map evidence supported one party[44]. On whichever of the foregoing terminological bases is adopted, the "general trend" of the map evidence is at the least "preponderantly", "by and large" and "in its totality" – in a word, is overall – in the sense presented by Indonesia. Indonesia submits that the cartographic evidence it has adduced is clearly confirmatory of its title to Ligitan and Sipadan as established by the 1891 Convention.

---

42 *UNRIAA*, XXI, p. 53, at p. 166 (footnotes omitted).

43 *Ibid.*

44 *Eritrea/Yemen Arbitration*, Award of the Arbitration Tribunal in the First Stage of the Proceedings, 9 October 1998, at p. 99, para. 388.